

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF MARYLAND

3 UNITED STATES OF AMERICA)
4)
5 vs.)
6 BURUDI JARADE FAISON,)
7 Defendant.)
_____)

Case Number 8:19-cr-00027-GJH
and 8:18-cr-00607-GJH

8 TRANSCRIPT OF PROCEEDINGS - SENTENCING HEARING
9 BEFORE THE HONORABLE GEORGE JARROD HAZEL
10 FRIDAY, JANUARY 10, 2020; 10:30 A.M.
11 GREENBELT, MARYLAND

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1 P R O C E E D I N G S

2 (Call to order of the Court.)

3 THE COURT: Good morning. You may be seated. The
4 government may call the case.

5 MS. WRIGHT: Good morning, Your Honor. We are here
6 for two matters entitled United States of America versus Burudi
7 Jarade Faison. The first is a sentencing hearing in criminal
8 number GJH-19-27. The second is a hearing upon alleged
9 violations of supervised release in criminal number GJH-18-607.

10 I am Elizabeth Wright, and with me is Michael Morgan, on
11 behalf of the United States, and we are joined at counsel table
12 by ATF Special Agent Jamie Rohsner.

13 THE COURT: Good morning to you all. And I do see we
14 have Mr. Faison representing himself. He's joined by
15 Mr. Miller, who is his standby counsel, and I do recognize
16 Mr. Patel, the appellate guru of the Federal Defender's Office.
17 So I appreciate all of their appearances here today.

18 I'll note, because -- well, I'll note this. At the end
19 of every jury trial, I always go back and talk to the jurors
20 and, at the end of every one -- and I don't know how many I've
21 had at this point -- I invite the jurors to return for
22 sentencing to see the process as it plays out, and I do want to
23 acknowledge that for the very first time, someone has taken me
24 up on that. And so I just wanted to recognize that as well.

25 So with that, however, we will begin.

1 On October 11, 2019, the defendant appeared before the
2 Court for trial and, at the conclusion of that proceeding, was
3 found guilty on Count One, felon in possession of firearms and
4 ammunition; was found not guilty on Count Two, felon in
5 possession of ammunition. Upon a finding of guilt, the Court
6 ordered preparation of a presentencing report, and we scheduled
7 sentencing for today.

8 As Ms. Wright remarked, we do also have the supervised
9 release petitions. As I understand it, the supervised release
10 violations were this case; is that accurate?

11 MS. WRIGHT: Yes, they stemmed from the precise
12 offense conduct, Your Honor.

13 THE COURT: And so we'll -- I guess as we go, we'll
14 see how we want to handle that, in what order we take that up.

15 But in terms of what I have received and reviewed in
16 preparing for sentencing, I, of course, did receive the
17 presentencing report; I received the sentencing memorandum of
18 the government, which had a number of attachments; I received a
19 sentencing memorandum from the defendant; and then I also
20 received a letter from the defendant; I received a brief from
21 the Federal Defender's Office as *amicus curiae*; and then I did
22 receive -- and I had the name and address of the juror
23 redacted, but I did provide to the parties the letter that I
24 received from one of the jurors in this case.

25 Is there anything else that I should have received but

1 haven't mentioned?

2 MS. WRIGHT: Your Honor, the government did file a
3 response brief on Wednesday as well, replying to Mr. Faison's
4 sentencing memorandum. And we did have a courtesy copy sent to
5 chambers, as well as filing it on ECF.

6 THE COURT: I've been in Baltimore all week, so it
7 might not have made it to me. I might have to take a moment
8 and look at that.

9 MS. WRIGHT: Of course, Your Honor.

10 THE COURT: The last thing I have here -- I'm looking
11 at the docket. I have your sentencing memorandum, if that's
12 what you're referring to, which does -- I mean, your sentencing
13 memorandum is 30-something pages and does address those issues.
14 Is that what you're referring to?

15 MS. WRIGHT: No, Your Honor. On the 8th -- it's at
16 ECF number 112 -- we filed a response to the defendant's
17 sentencing memorandum and which also addressed Mr. Patel's
18 proposed *amicus* argument. I do have a hard copy if I can hand
19 that up to the Court.

20 THE COURT: Sure. Just directly to me is fine.

21 I do apologize. I haven't seen this, so I'm going to
22 need to take 20 minutes and go back and read this. I usually
23 physically check the docket, is the last thing I do, before I
24 come out here to make sure, but I did not do that this morning,
25 and I have not seen this. Like I said, I've been in Baltimore,

1 so if something came to chambers, I just didn't see it.

2 So I'll have to take a 20-minute recess -- I apologize to
3 those who are waiting. It might take less than that, so if you
4 stay nearby -- it's 13 pages, so it's not like it's something I
5 can't digest relatively quickly. So I'll be back soon.

6 (Recess from 10:40 a.m. to 10:55 a.m.)

7 THE COURT: Good morning again. We are back. I do
8 apologize for that. As I had indicated, I had been preparing
9 for the sentencing earlier in the week, and I've been in trial,
10 and so I guess a couple of materials came in since we had first
11 assembled the materials, so I didn't see that. So I do
12 apologize for that. But I now have had the opportunity to read
13 the government's additional filing.

14 I also should note that we received letters in support of
15 Mr. Faison.

16 Anything else that I should have received but have not
17 mentioned?

18 MS. WRIGHT: Not from the government. Thank you,
19 Your Honor.

20 THE COURT: Anything else from Mr. Faison that I
21 haven't mentioned?

22 THE DEFENDANT: No, sir.

23 THE COURT: So there are a variety of guideline
24 issues that I think are at play, and my understanding is the
25 government has some witnesses that I guess go to some or all of

1 them.

2 Just to list what I know we have to discuss, there's the
3 issue of whether or not his base offense level is a 20 or a 22,
4 which is primarily a legal argument dealing with whether or not
5 the attempt -- his prior attempt conviction counts for the
6 purposes of the guidelines, whether that counts as a controlled
7 substance offense or not.

8 There's the obstruction-of-justice enhancement, which we
9 should probably discuss.

10 There's also the four-level enhancement, which I think is
11 worth discussing, whether or not that applies here related to
12 this having been in furtherance of another felony offense.

13 Then Mr. Faison has raised 5K2.10, as a departure request
14 based on the victim's conduct, and 5K2.12 based on coercion.

15 Are there any other issues -- I'll start first with
16 Mr. Faison -- other than those that I have listed that you
17 think are at issue as it relates to the guideline calculation?

18 MR. MILLER: No, Your Honor.

19 THE COURT: Did I cover everything?

20 MR. MILLER: Yes.

21 THE COURT: Ms. Wright, is there anything that I
22 haven't covered?

23 MS. WRIGHT: Your Honor, I believe Mr. Faison's
24 objections pertain to several other factors. I didn't actually
25 catch if the Court mentioned the question of the firearm being

1 stolen and other things in that regard, but the evidence that
2 the government intends to put forward will address some of
3 those points. So I think these are the only ones that are in
4 dispute at this point.

5 THE COURT: Very well. Mr. Faison, did you have an
6 opportunity to read the presentencing report?

7 THE DEFENDANT: Yes.

8 THE COURT: Ms. Wright, did you have an opportunity
9 to read the presentencing report?

10 MS. WRIGHT: Yes. Thank you, Your Honor.

11 THE COURT: Other than things I've already listed,
12 any additional objections?

13 MS. WRIGHT: No. Thank you, Your Honor.

14 THE COURT: And I understand you do have some
15 witnesses you wanted to call.

16 MS. WRIGHT: Yes, Your Honor.

17 THE COURT: Whenever you're ready.

18 MS. WRIGHT: Thank you, Your Honor. The government
19 will call ATF Special Agent Christopher Szokolczai.

20 THE COURT: Very well.

21 THE COURTROOM DEPUTY: Please step forward to the
22 witness stand.

23 THE WITNESS: Yes, ma'am.

24 THE COURTROOM DEPUTY: Remain standing and raise your
25 right hand.

1 (Government witness **CHRISTOPHER SZAKOLCZAI** sworn.)

2 THE COURTROOM DEPUTY: You may be seated, sir. Speak
3 clearly into the microphone, please state your name and spell
4 your name for the record.

5 THE WITNESS: My name is Christopher Szakolczai. The
6 last name is spelled S-Z-A-K-O-L-C-Z-A-I.

7 THE COURTROOM DEPUTY: Thank you.

8 THE COURT: I'm sorry, pronounce that again.

9 THE WITNESS: Szakolczai.

10 THE COURT: I shouldn't chuckle as I ask you to
11 pronounce it.

12 THE WITNESS: If you drop the z's, it makes a little
13 more sense. A little more sense. It's all relative, I guess.

14 THE COURT: Thank you. I appreciate it.

15 **DIRECT EXAMINATION BY MS. WRIGHT FOR THE GOVERNMENT**

16 BY MS. WRIGHT:

17 Q. Good morning, sir.

18 A. **Good morning.**

19 Q. So how are you employed?

20 A. **I am employed by the Bureau of Alcohol, Tobacco,**
21 **Firearms, and Explosives as a special agent.**

22 Q. And how long have you served in that position?

23 A. **Three years and number of days now.**

24 Q. And did you work in law enforcement before joining ATF?

25 A. **Yes, ma'am.**

1 Q. Can you briefly describe how long that was and what time
2 of work you were doing?

3 A. I was a Baltimore City police officer for roughly five
4 years. I worked in numerous capacities, including patrol and
5 then the plain clothes narcotics/street crimes unit.

6 Q. And among other training, did you receive firearms
7 training as part of your work in Baltimore?

8 A. Yes, I received firearms training in Baltimore and also
9 with ATF.

10 Q. And did you also receive training regarding controlled
11 substances?

12 A. Yes, I received numerous hours of training between
13 Baltimore, ATF, and then FLETC, and also experience from more
14 experienced officers and so on and so forth through my career.

15 Q. And have you ever previously been qualified as a drug
16 expert, for instance, in any criminal cases?

17 A. Yes. So in my time in Baltimore, I was deemed an expert
18 in the district and circuit courts of Baltimore in reference
19 to -- I want to try and get this right -- the packaging and
20 distribution of street-level narcotics, along with some other
21 aspects I can't remember fully.

22 Q. And, generally, from your training and experience, have
23 you received information regarding identifying controlled
24 substances and the indicia of, for instance, distribution and
25 manufacturing of controlled substances?

1 A. Yes, ma'am.

2 Q. And have those controlled substances that you've become
3 familiar with included cocaine and cocaine base?

4 A. Yes, ma'am.

5 Q. And have you also had occasion to learn about PCP?

6 A. Yes.

7 Q. And during the course of your work for ATF, have you been
8 involved in drug investigations?

9 A. Yes, I have.

10 Q. Also during your time with ATF, have you learned about
11 silencers?

12 A. Yes, I have.

13 Q. Can you briefly describe how you have come to learn about
14 those?

15 A. During the academy, we had the ability to fire a number
16 of weapons. They're called NFA weapons, so full automatic
17 weapons, but some have silencers on them. Along with research
18 that I've done myself on my own time, and I've also had the
19 opportunity to speak to -- I guess you can them experts within
20 ATF, in reference to silencers and so on and forth, about the
21 way they work, the components of a silencer, and so on and so
22 forth.

23 Q. And is it fair to say that you have particularly taken
24 advantage of opportunities to have that type of conversation?

25 A. Yes, ma'am.

1 Q. Have you received any experience or information, during
2 the course of your employment, regarding the manufacture or
3 building of silencers?

4 A. More so it was private research that was done in building
5 homemade silencers. So, for example, people -- building a
6 silencer isn't inherently illegal by itself. So there's ways
7 to build it at home, and there's information that's on the
8 internet and so on and so forth.

9 Q. Okay. So from your personal research, is it fair to say
10 you have reviewed some of the information on the internet and
11 seen how individuals are building and working with silencers?

12 A. Yes, exactly.

13 Q. Thank you. Now, during the course of your duties with
14 the ATF, is it correct that you were present at the execution
15 of a search warrant at the defendant's residence on September
16 5, 2018?

17 A. Yes, ma'am.

18 Q. And is it fair to say that you testified regarding that
19 presence at trial in this case as well?

20 A. Yes, ma'am.

21 Q. And just to have it fresh in people's minds, what was
22 your role during the execution of that search warrant?

23 A. I searched Mr. Faison's room.

24 Q. And was anyone else searching that room with you?

25 A. Yes, ma'am; Special Agent Rohsner.

1 MS. WRIGHT: Your Honor, if I may, I'll show the
2 witness a packet of photographs that I've marked as
3 Government's Exhibit 1 for purposes of this hearing and see if
4 he recognizes this.

5 BY MS. WRIGHT:

6 Q. Do you recognize those?

7 A. I do.

8 Q. And is it fair to say those are generally pictures from
9 the search warrant execution?

10 A. Yes, ma'am.

11 MS. WRIGHT: Your Honor, the government would move
12 the admission of that packet of photographs as Government's
13 Exhibit 1.

14 THE COURT: Sure.

15 MS. WRIGHT: Thank you. And I'll retrieve those from
16 the witness in order to display some of those.

17 BY MS. WRIGHT:

18 Q. Now, to get the Court situated, if we may, just going
19 through the pages in this packet in order, so starting with
20 page 1, what is the Court looking at here?

21 A. This is the front door -- or the bedroom door to
22 Mr. Faison's room.

23 Q. And looking at page 2.

24 A. So this would be the bed that we saw in the initial
25 photograph in Mr. Faison's room.

1 Q. And I'd like to draw your attention to, I guess, a
2 closer-up photograph. Is it fair to say that's what the third
3 page of this is?

4 A. Yes, ma'am.

5 Q. I'm sorry, I didn't hear the answer.

6 A. Yes, ma'am. Yes, this is the close up of the previous
7 photograph.

8 Q. Okay. And as you described at trial as well, did you
9 have occasion to look through some of the packet of papers that
10 were on the defendant's bed?

11 A. I did.

12 Q. Okay. And I'll pass up what was previously submitted as
13 exhibit E to the government's sentencing memorandum and also
14 show the fourth page of the packet of photos. So on the fourth
15 page, can you describe what you're showing for the photographer
16 there?

17 A. So this was in the pile of paperwork that was located on
18 the bed. This is a U.S. Court of Appeals document with
19 Mr. Faison's name on it.

20 Q. And then for exhibit E, which I'll show you, once you get
21 that, can you take a look at this and say where you found it
22 and what interest it posed you as a member of law enforcement.

23 A. So these are -- this is a document that was located -- or
24 documents that were located on Mr. Faison's bed, below the
25 paperwork. If we can go back one picture maybe, I can show you

1 kind of where it was. Yes, so they were all located in this
2 area, in this stack of papers or documents or books. I don't
3 know what you would like to call them, but that's what these
4 pages are.

5 Q. All right, and was there -- could you describe for the
6 Court what, if anything, had drawn your attention to those
7 particular pieces of paper?

8 A. Sure. There was a number of mentions of, for example,
9 hydroponics grow lights. It seemed like things that had to do
10 with drug paraphernalia.

11 And then on the other page there was -- on a piece of
12 lined paper it says "cocaine purity testers." And then over to
13 the right of that, there was actually a thing that said
14 "silencer parts," which that was the main piece that drew my
15 attention.

16 Q. And were there other items on the bed that drew your
17 particular attention, as well as an ATF agent?

18 A. Yeah, so we saw the -- well, I saw the paperwork that
19 said silencer parts, and then -- so then I -- again, obviously
20 looking more at the tubes over here. So in this photograph you
21 can see what look like a bunch of flashlights. So this would
22 be, like, referred to as, like, just a regular flashlight. You
23 might see, like, a D cell battery flashlight or, like, a
24 Maglight flashlight, or it might be this one. They're
25 flashlight tubes.

1 And then within the photograph as well, you can see these
2 items up here. These items are -- they're sold as -- there's
3 multiple ways of selling them. So making a silencer at home,
4 there are kits, there are proper kits you can buy. A lot of
5 the homemade ones come with these things, which are silencer
6 precursors. So these are sold as hidden tubes or solvent traps
7 or something of that nature, but what they're actually turned
8 into, they actually become the baffle of the silencer.

9 So the way, like, a silencer will work is that these
10 baffles, when they're converted and drilled through, will fit
11 into these flashlight tubes, and then these end caps will get
12 screwed onto to it, and then that could be fitted to the
13 firearm, and that then becomes your silencer.

14 To test it, I actually took the baffles from up here and
15 actually fit them into the flashlight tube and found that they
16 fit. It wasn't giggling around. It was actually designed to
17 fit into that flashlight tube.

18 Q. And so based on what you were saying there in your
19 manipulation of the items there, did you have a conclusion
20 based on your training and experience?

21 A. Yeah, so just based upon my knowledge of people building
22 homemade silencers, it was the precursors to that. It was the
23 attempt -- or it was in production, you can say, or there was
24 an attempt or -- what's the word I'm looking for here? There
25 was the idea of trying to build a silencer.

1 Q. And were there any other items that you remember seeing
2 in the bedroom that were also consistent with that idea?

3 A. Yes. So there were tools that were located below the
4 bed. I know there was, like, a Dremel kit or some sort of,
5 like, kit for various attachments that you can put onto a
6 Dremel or, like, a drill, along with -- I think there was a
7 corded drill, which would be required to complete these -- I
8 can't remember the exact way these are sold online, but if you
9 drilled these through, the holes, you have to actually drill
10 that through to actually have the bullet pass through. So
11 you'd have to drill it to make it an actual baffle, so on and
12 so forth.

13 Q. I'll show, also, what is the second to last page in the
14 package of photos. Can you describe for the Court what is
15 being shown here?

16 A. Yeah. So this is my beautiful shoe, and then next to it
17 is actually -- this is your attachments and whatnot. So for
18 your Dremel tool or your rotary tool or what have you. And
19 then it looks like this is the -- like a corded drill, if I
20 remember correctly.

21 And then on top of that, there seems to be, like, a
22 toothbrush right here that, from my experience of, like, having
23 done -- like, having had owned firearms and cleaning my gun, I
24 use a toothbrush just like this. A lot of times it gets really
25 dirty, just like the bristles seem to be really dirty there,

1 but that's just what I gathered from the photograph.

2 Also, next to my foot is another baffle. It's not a
3 baffle yet. I can't say that. It is the precursor to wanting
4 to build a silencer or it is the idea of -- that piece is
5 required for the silencer. That was the exact same piece that
6 would have been found on the bed as well, that fit into the
7 tube.

8 Q. All right, thank you, sir. From your review and
9 manipulation of these, in your training and experience, what
10 separated these from being considered silencers?

11 A. So, again, the baffles have to be drilled through. I'll
12 just draw it over here. If you look at, like, the baffle, it's
13 circular. They were solid on top. But even on the website, I
14 think -- like, there's ways -- they actually mark the holes for
15 you. So they'll give you, like, a center punch hole so you can
16 align the drill bit. When you drill it through to actually
17 have the bullet pass through, you're actually creating the
18 baffle. Before that, you just have a piece of metal that is
19 not going to be adequate for the silencer. However, that
20 piece, again, is imperative for the silencer. That's how the
21 silencer actually functions.

22 Q. Did you have occasion -- any occasion to look at internet
23 search history downloaded from the tablet that was used from
24 the defendant's bed in this case?

25 A. Yes, I did.

1 MS. WRIGHT: If I may, Your Honor, I'll approach and
2 show the witness what I've marked as Government's Exhibit 2.

3 THE COURT: Sure.

4 BY MS. WRIGHT:

5 Q. Do you recognize that document?

6 A. Yes, this is the search history for the tablet that was
7 located in the room. You can see searches such as --

8 MS. WRIGHT: And before you comment on what's on it,
9 Your Honor, we move the admission of that set of -- that
10 printout, the set of pages from the tablet download.

11 THE COURT: Very well.

12 BY MS. WRIGHT:

13 Q. Sir, could you describe what you're looking at, what you
14 are seeing on those pages that was of interest?

15 A. Yeah, so this is the search history from the tablet. You
16 see things such as "silencershop.com," along with NTC Trading
17 Company. When I actually searched for NTC Trading Company, I
18 found that exact baffle on there and sold as a -- it might
19 actually be right here. Yeah, it's a "D Cell Super
20 Combo-Battery End Adapter, Light Bulb End Cap," so on and so
21 forth, and then it's also -- so that would be -- so the tubes
22 were D cell battery tubes, and these were sold as pieces for
23 that. On the web site they say that -- well, as I just
24 mentioned before was that they actually have the baffle, and it
25 has a center punch, so you know where to drill for the

1 actual -- to make it a baffle. I think they're sold as hidden
2 compartments, is what they call them. Just like, a lot of
3 times, solvent traps are sold as cleaning supplies for weapons,
4 but, really, they can be converted into a silencer.

5 Q. All right, and is there -- I guess highlighting, flagging
6 some of the items of interest from that search appearing on
7 your copy of the exhibit, what is sort of the approximate date
8 range of the pages that you're looking at?

9 A. Looks like the initial search on this first page is
10 4-17-2018, and the last one is 8-17-2018.

11 Q. I will recover that document from you. Just to let the
12 Court view it, looking at the first page of that, I guess some
13 of the references highlighted include the website --

14 A. You can't see it, but I think one of them --

15 Q. Silencershop.com --

16 A. Yeah, silencershop.com. And I think on the third page it
17 was -- yeah, you'll see NTC Trading Company.

18 THE COURT: You'll need to zoom it in if you want us
19 to actually be able to see it.

20 BY MS. WRIGHT:

21 Q. There we go. Thank you.

22 A. So, yeah, you'll see NTC Trading Company, and then you'll
23 see things like -- if you move this up a little. There you go.
24 You'll see things like D cell titanium solvent trap kit, thread
25 protector, so on and so forth. Another big popular thing is

1 freeze-out plugs for automobiles. You can drill holes through
2 them and make silencers out of them too.

3 Q. Thank you, sir. Now, did you recover any evidence of
4 suspected controlled substances in the defendant's room?

5 A. Yes. I was with Special Agent Rohsner, and I witnessed
6 the recovery of a backpack that had items in it.

7 Q. Okay. And before we talk about the backpack, I'll
8 actually turn your attention to a couple of other photos.
9 Keeping your attention on the photograph that was the second to
10 last page in the packet, was there anything relevant to, in
11 your mind, controlled substances in that photograph?

12 A. Are you referring to the drawer?

13 Q. No, I believe it should show up as the one with your foot
14 under the bed?

15 A. Oh, I'm sorry. I see what you're saying. So it's not a
16 very good photograph, unfortunately. You can't really see it
17 very well, but there is actually a number of vials, right here,
18 or plastic tubes of some sort that contained suspected PCP that
19 I located as well.

20 Q. Okay, and what was your -- the basis for your suspicion
21 or belief that this was PCP?

22 A. Just the packaging of them, so on and so forth, and then,
23 again, the way they're packaged in the individual vials
24 underneath the bed.

25 Q. Okay. Was there any odor that gave you any indication of

1 what controlled substance it might be?

2 A. There was definitely an odor. Plus, they were -- the
3 thing that threw me off, they were packaged in plastic, as
4 opposed to glass, which is regularly noticed. Plastic is not
5 the proper way to package them because PCP will actually eat
6 through plastic, so.

7 Q. Do you remember approximately how many, I guess,
8 individual packages there were?

9 A. I want to say less than 10, like six or seven maybe. I
10 can't remember the exact number.

11 THE COURT: I'm sorry, you said -- say that again,
12 please.

13 THE WITNESS: It's less than 10. I want to say six
14 or seven, but I can't remember the exact number.

15 THE COURT: Are you saying six serving sizes or --

16 THE WITNESS: Oh. So the vials are -- sorry for the
17 court reporter -- about yay big. I don't know how you would
18 explain it. They were smaller. They weren't, like, ounce
19 bottles. Ounce bottles are, obviously, much bigger, and they
20 would be bigger in this photograph, but they weren't that size.
21 So I can't tell you the exact weight or the exact fluid
22 measurement on them, unfortunately. Sorry.

23 BY MS. WRIGHT:

24 Q. And turning to page 5 of the packet of photographs, do
25 you recognize what we're looking at there?

1 A. I do. This is the dresser -- top, left dresser drawer.
2 In the photograph you can see -- I recognize -- or I found this
3 pill bottle along with Pyrex.

4 Q. Okay, and why did you take note of that?

5 A. It just seemed to have residue, which I suspected to be
6 CDS residue. Pyrex is a common way to cook up crack cocaine,
7 so on and so forth. I would say heat resistant or Pyrex is
8 meant to be exposed to heat, so that's just a common tool that
9 I've seen used in many, many, many search warrants when it
10 comes to crack cocaine and so on and so forth.

11 Q. And was there -- based on your search, do you recall
12 anything specifically linked to the defendant that was also in
13 that drawer?

14 A. Yeah, I think the pill bottle had a name on it, if I
15 remember correctly, but I'm kind of fuzzy on that. Sorry.

16 Q. Then turning to the backpack that you referred to, I'll
17 show you a set of photos which are the next pages in the packet
18 of photos, and can you describe what we're looking, I guess, on
19 the first of these four backpack photos? What are we looking
20 at?

21 A. It's another Pyrex or another glass container or -- not a
22 graduated cylinder but another glass object that seemed to have
23 CDS residue on it.

24 Q. And the next page?

25 A. And then this is the close-up of it. Again, this is the

1 glass item, another glass item with, like, a blue plastic lid.
2 You're seeing just indications of CDS paraphernalia and so on
3 and so forth, for cooking and making drugs.

4 Q. And which drugs would be consistent with making --

5 A. So from my experience, this would be crack cocaine. You
6 have to cook it. Obviously, the glass is for that.

7 Q. And the following page, do you recognize what was in
8 there?

9 A. I think this is going to be like a baking soda box or box
10 of baking soda, which is commonly used as a cutting agent or as
11 a way to help make crack cocaine. And then you have your
12 strainer and whatnot. So it's actually, again, CDS
13 paraphernalia.

14 Q. And then, finally, elsewhere in the residence -- I'll
15 show you, I guess, the last photograph, but is it fair to say
16 that you found inositol powder as well?

17 A. Yeah, I wrote -- I may not have been the first person to
18 find it, but I definitely did notice this inositol, another
19 cutting agent for crack cocaine and another agent used to make
20 crack cocaine. It's a common drug-cutting agent.

21 Q. Okay, and do you recall where you saw that in the
22 residence?

23 A. So this was on the porch, in, like, the corner, on the
24 actual windowsill of the porch or on the screened-in porch's
25 sill; I'll say that.

1 Q. Thank you, sir. I have no further questions at this
2 time.

3 THE COURT: Cross-examination, Mr. Faison?

4 **CROSS-EXAMINATION BY THE DEFENDANT**

5 BY THE DEFENDANT:

6 Q. Were you there for the search of the entire basement?

7 A. I was in your room for the basement. I wasn't there for
8 every single room, if that makes sense.

9 Q. Do you know if any other items were found in the
10 basement?

11 A. I do know that other items were found. I don't know
12 exactly what was found.

13 THE DEFENDANT: Just one minute, Your Honor. I'm
14 trying to find the particular --

15 THE COURT: Sure, do what you need to do.

16 THE DEFENDANT: Your Honor, I'll be showing BF 102.
17 It's a picture from the search.

18 BY THE DEFENDANT:

19 Q. Sir, can you describe what you see in this picture?

20 A. I've seen this picture before. To me it would be -- it
21 looks like items that are commonly packaged for CDS
22 distribution on the street or street-level distribution. You
23 can see the individual vials and so on and so forth.

24 Q. When you last saw this picture, do you remember where
25 they told you this picture was taken from?

1 A. I don't. I know it was from another room, I will say
2 that. It's not from your room. I don't remember exactly which
3 room it came from though.

4 Q. And the items that you see in this picture, are they
5 reminiscent of the things that were found in the other bedroom?

6 A. They do look similar, yes.

7 Q. And would you consider this to be a bulk or a portion of
8 some?

9 A. This is a larger portion, yes.

10 Q. So in your experience, if this was found in one area,
11 would it be possible that the majority of this came from a
12 separate section, other than what you found in the bedroom?

13 A. I'm not a hundred percent sure I understand your
14 question. Sorry.

15 Q. When you do searches and you find a bulk, would you
16 determine that a smaller amount that you found came from that
17 bulk?

18 A. I think I see -- okay, I think I see what you're saying.
19 If you're asking if I believe the vials underneath your bed
20 came from here, I can't say for sure. I can say that they are
21 packaged similarly, and they had similar substance inside of
22 them, but that's all I can determine. I can't say that they
23 came from here because yours had a plastic bag as well, so.

24 THE DEFENDANT: No other questions. Thank you.

25 THE COURT: Just to follow up on that, but you are

1 saying that what was found in his room is consistent with what
2 was found in this picture.

3 THE WITNESS: Yes. So these vials that you see here
4 are around the same size. So that's probably a better picture
5 for Your Honor to understand, like, the items that were found
6 underneath the bed, like the vial. So it --

7 THE COURT: I'm sorry, I didn't mean to interrupt
8 you.

9 THE WITNESS: No, no. Sorry.

10 THE COURT: So you certainly can't exclude the
11 possibility that what came from his room originated from --

12 THE WITNESS: Oh, no, exactly. I can't say where it
13 came from for sure, but I can say that these items are packaged
14 similarly, looks to be the same substances inside of them.

15 THE COURT: And you don't know where this came from,
16 other than it was somewhere other than his bedroom.

17 THE WITNESS: I know it was somewhere in another
18 room. I don't remember which one it was, but this wasn't the
19 room I searched.

20 THE COURT: And there's more here than what was found
21 in his room.

22 THE WITNESS: Oh, yes.

23 THE COURT: Okay. Anything else, Mr. Faison, before
24 I turn it back to the government?

25 THE DEFENDANT: No further questions.

1 THE COURT: Redirect?

2 MS. WRIGHT: None. Thank you, Your Honor.

3 THE COURT: All right, sir, thank you so much for
4 your testimony.

5 THE WITNESS: Thank you.

6 THE COURT: The next government witness.

7 MR. MORGAN: Your Honor, the government calls Matthew
8 Leonard.

9 THE DEFENDANT: Your Honor, just one thing.

10 THE COURT: Sure.

11 THE DEFENDANT: I want to correct the record. I
12 believe I gave you the wrong number. The number is BF 0192.

13 THE COURT: BF?

14 THE DEFENDANT: 0192.

15 THE COURT: All right. And that will allow us to
16 identify it because you haven't printed out a copy for us. It
17 will be Defense 1 for the purposes of this hearing. At some
18 point, Mr. Miller, I'd ask that you get us a copy of that for
19 the record.

20 THE COURTROOM DEPUTY: Please step forward to the
21 witness stand, remain standing, and raise your right hand.

22 (Government witness **MATTHEW LEONARD** sworn.)

23 THE COURTROOM DEPUTY: You may be seated, sir. Speak
24 clearly into the microphone, please state your name and spell
25 your name for the record.

1 THE WITNESS: Matthew J. Leonard, L-E-O-N-A-R-D.

2 THE COURTROOM DEPUTY: Thank you.

3 **DIRECT EXAMINATION BY MR. MORGAN FOR THE GOVERNMENT**

4 BY MR. MORGAN:

5 Q. Good morning, sir.

6 A. Good morning.

7 Q. How are you employed?

8 A. I'm a special agent with the Bureau of Alcohol, Tobacco,
9 Firearms, and Explosives.

10 Q. And how long have you been in that position?

11 A. Since September of 2014.

12 Q. And before your years as an ATF special agent, what did
13 you do?

14 A. I was a firefighter in the District of Columbia.

15 Q. Briefly, what's your educational background?

16 A. I have a masters degree in management from Hopkins and a
17 bachelor's degrees in fire science from University of Maryland.

18 Q. And you testified at the trial in this case?

19 A. Yes.

20 Q. And you testified about your training?

21 A. Yes.

22 Q. And can you briefly describe some of the training that
23 you had?

24 A. I have the basic criminal investigator training program
25 from FLETC, the Federal Law Enforcement Training Center, and

1 then special agent basic training from ATF, as well as several
2 advanced trainings specific to firearms.

3 Q. And have you had training in how those firearms work?

4 A. Yes.

5 Q. And how they're manufactured?

6 A. Yes.

7 Q. And how they're sold?

8 A. Yes.

9 Q. And have you had training also in homemade weapons?

10 A. Yes.

11 Q. And about training in how to trace stolen weapons?

12 A. Yes.

13 Q. Turning your attention to this case, you had a chance to
14 examine two firearms in this case, an AR-type pistol and a .45
15 Kimber 1911 pistol; is that correct?

16 A. Yes.

17 Q. And you testified with regards to both of those weapons
18 at trial; is that correct?

19 A. That's correct.

20 Q. So turning your attention to the Kimber 1911 pistol, were
21 you able to examine that prior to trial?

22 A. Yes.

23 Q. And what did you learn about that gun as far as make and
24 model?

25 A. That it was a semiautomatic pistol, chambered in .45 ACP,

1 manufactured in Yonkers, New York.

2 Q. So does the ATF trace stolen firearms?

3 A. All firearms that are recovered and brought through the
4 ATF are traced if it's possible to do a trace.

5 Q. And why does the ATF do that?

6 A. So, typically, when a firearm is recovered, it was either
7 taken from somebody that wasn't supposed to have it, or it
8 entered into an illicit marketplace, and we trace the firearms
9 to determine the actual ownership pathway back to where it was
10 manufactured. So it helps us further investigations, but it
11 also helps us to determine whether we might have to return a
12 firearm to an innocent owner, if it was taken from them, or if
13 the firearm was just possessed in an illicit manner and where
14 that firearm came from and how it could have gotten into that
15 position.

16 Q. And is a person who is prohibited from purchasing a
17 firearm able to purchase through a standard federal firearms
18 licensed dealer?

19 A. No. People that are prohibited from -- or people that
20 are found guilty of a crime punishable by more than a year in
21 prison are prohibited from possessing firearms, and, therefore,
22 they would not pass the national incident background check that
23 would -- or instant background check that would show up on the
24 record that they were prohibited. So then a transfer -- or an
25 FFL transfer would not take place.

1 Q. So do those individuals procure weapons by other means?

2 A. Yeah --

3 Q. And how do they do that?

4 A. So firearms enter an illicit market through straw
5 purchasers, where someone would go to a gun store and
6 essentially purchase a firearm and misrepresent that they were
7 going to buy it for themselves but, in turn, would be
8 transferring it to somebody else illegally. Firearms can be
9 stolen from individuals or from gun stores, and they enter the
10 market that way. And then firearms can also be manufactured in
11 like a homemade capacity.

12 Q. And was a trace conducted on the Kimber 1911 pistol?

13 A. Yes.

14 Q. And what, if anything, did you learn about the history of
15 that firearm?

16 A. It followed up on my research showing that it was
17 manufactured in the State of New York, but also that, in the
18 course of that firearm's life and travel, it had been stolen
19 from a gun store in Virginia in 2008.

20 MR. MORGAN: Your Honor, may I approach with
21 Government's Exhibit 3?

22 THE COURT: Sure. I assume that's been cleared for
23 safety?

24 MR. MORGAN: It's cleared and made safe, Your Honor.

25 BY MR. MORGAN:

1 Q. Sir, I've shown you Government's Exhibit 3. Do you
2 recognize that?

3 A. Yes.

4 Q. What is it?

5 A. This is a AR-type pistol.

6 Q. Have you seen that before today?

7 A. I have.

8 Q. When did you see it approximately?

9 A. I examined this prior to trial, and then I examined it
10 prior to that for an initial report.

11 Q. And is this the firearm that you testified about in
12 trial?

13 A. Yes.

14 Q. And what is that firearm?

15 A. So it's an AR-type pistol with next to no markings on it.
16 It's a homemade pistol, basically, or a homemade firearm. And
17 by next to no markings, I mean it has an indicator for the
18 selector switch saying "fire" and "safe," but, otherwise,
19 there's no manufacturer's markings on it. There's forge
20 markings on it, indicating where the blanks were manufactured,
21 but the firearm itself doesn't have any actual markings to
22 indicate who made it, where it was made, or a serial number.

23 Q. Just for clarification, when you say blanks, what is
24 that?

25 A. So for homemade firearms, the lower receiver in this

1 case, which would be the lower part of this weapon here, would
2 have a pocket of aluminum that's full. And then to manufacture
3 it, someone would have to mill out aluminum from inside this
4 casing to be able to put the trigger parts kit in.

5 Q. So that part had a forge mark on it.

6 A. Yeah, I did find a forge mark on it.

7 Q. And do you know if this AR-type pistol meets the
8 definition of a firearm under federal law?

9 A. Yes. This firearm was test fired. It does expel a
10 projectile by the action of an explosive, so it does meet the
11 definition of a firearm.

12 Q. And so were you able to determine anything about where
13 that was manufactured?

14 A. No. Short of the two forge markings that are on it that
15 show that the blanks were made -- the upper receiver and the
16 lower receiver blank were made in Virginia. We were not able
17 to determine where the lower receiver turned into an actual
18 functioning receiver.

19 Q. Turning your attention to the magazine. Did you have a
20 chance to examine the magazine during your review of this
21 weapon?

22 A. Yes.

23 Q. And please describe this magazine to the Court.

24 A. It's manufactured by a company called Magpul. It's a
25 polymer magazine or a plastic magazine, and it has a 30-round

1 **capacity.**

2 Q. Thank you. No further questions. Thank you.

3 MR. MORGAN: May I retrieve the exhibit?

4 THE COURT: You may. Mr. Faison.

5 **CROSS-EXAMINATION BY THE DEFENDANT**

6 BY THE DEFENDANT:

7 Q. Sir, have you been trained in recognizing whether or not
8 an item falls under being manufactured in another state?

9 A. In terms of firearms? Yes. I had interstate nexus
10 training.

11 Q. In your training, what is required for an interstate
12 nexus connection?

13 A. Effectively, a firearm is manufactured in one place, and
14 then it would travel across state lines to another place.

15 Q. Was the particular firearm that you just looked at, was
16 it manufactured, as far as you could tell, by any particular
17 company?

18 A. No. The actual defined portion of the firearm itself, we
19 were not able to determine where it turned into a firearm.

20 Q. And, therefore, it has no interstate nexus connection.

21 A. Correct.

22 THE DEFENDANT: No further questions.

23 **QUESTIONING BY THE COURT**

24 THE COURT: I'm sorry, sir, I got confused about
25 something, and so I apologize. I might have to take you back

1 through things you've already talked about.

2 You talked about a firearm being stolen, correct?

3 THE WITNESS: Yes, sir.

4 THE COURT: And then a firearm that was manufactured
5 in the home -- or a firearm that was manufactured, I guess, by
6 someone other than a licensed manufacturer.

7 THE WITNESS: Yes, sir.

8 THE COURT: And this is where I just got confused.
9 Were you talking about two separate firearms or parts of the
10 same firearm?

11 THE WITNESS: Yes, sir. The first firearm we were
12 talking about is not here. It's a semiautomatic pistol. That
13 is also a semiautomatic pistol, but it's a separate firearm.

14 THE COURT: Okay. I just got confused. I thought
15 that's what you meant, but I wanted to make sure. So you were
16 talking about the two separate firearms that the defendant had.

17 THE WITNESS: Yes, sir.

18 THE COURT: Regarding the stolen firearm, was there
19 any evidence that Mr. Faison stole the firearm?

20 THE WITNESS: I'm not aware of any evidence.

21 THE COURT: Was there any evidence that you're aware
22 of that Mr. Faison was aware that the firearm was stolen?

23 THE WITNESS: I'm not aware of that either.

24 THE COURT: I think you said this already, but as a
25 felon, he's not allowed to have a firearm, correct?

1 THE WITNESS: Correct.

2 THE COURT: And so -- I mean, he's obviously -- he's,
3 as I'm sure you're aware, already been convicted of being a
4 felon in possession of a firearm, right? Like, he's already
5 facing punishment for that.

6 THE WITNESS: Yes, Your Honor.

7 THE COURT: As a felon, by definition, he would have
8 had to have received the firearm from some illicit source,
9 right?

10 THE WITNESS: Correct. Especially in Maryland,
11 where --

12 THE COURT: He can't walk into a store and get one.

13 THE WITNESS: Correct. In Maryland, firearms
14 transfers have to happen either at an FFL or at a state police
15 barracks.

16 THE COURT: So by definition, any felon in possession
17 of a firearm got it from some illicit source. Would you agree
18 with that?

19 THE WITNESS: Correct.

20 THE COURT: Whether it's a straw purchase, a stolen
21 firearm, or something that had been manufactured somewhere
22 else. If he's a felon, he got it from an illegal source,
23 right?

24 THE WITNESS: Yes, sir.

25 THE COURT: And that's going to be true of every

1 felon.

2 THE WITNESS: Yes.

3 THE COURT: So anybody who is convicted of being a
4 felon in possession of a firearm got it from some illicit
5 source, correct?

6 THE WITNESS: Yes.

7 THE COURT: And they may not know whether or not the
8 original source was a straw purchase, a stolen firearm, or had
9 been manufactured in someone's house. Would you agree with
10 that?

11 THE WITNESS: Correct. Especially with pistols,
12 because in every state pistols have to be transferred through a
13 legal process. So you can do a person-to-person transaction,
14 but for pistols, you still -- because you have to be 21 to
15 possess them, most state laws require that you identify that
16 that person is legally allowed to possess that firearm before
17 you transfer it to them.

18 THE COURT: So in terms of determining his behavior,
19 we don't know whether he knew if it came from a straw purchase
20 originally, it had been stolen originally, or someone made it
21 in their house. There's no way that he knows which of those
22 things happened that put the gun into the illicit market.
23 Would you agree with that?

24 THE WITNESS: Correct.

25 THE COURT: As to the gun that -- the other one, the

1 one that you said was homemade, was there evidence that he was
2 the one that did that?

3 THE WITNESS: I'm not aware of any evidence of that.

4 THE COURT: All right. Redirect.

5 MR. MORGAN: May I have the Court's indulgence?

6 Nothing further. Thank you.

7 THE DEFENDANT: Your Honor, if I may, I just have two
8 questions based on what you brought --

9 THE COURT: Was it based -- in follow up to my
10 questions?

11 THE DEFENDANT: Yes.

12 THE COURT: Okay.

13 **RECROSS-EXAMINATION BY THE DEFENDANT**

14 BY THE DEFENDANT:

15 Q. Do you remember the date that they said the Kimber was
16 stolen?

17 A. **No, not the exact date.**

18 Q. As far as purchasing a firearm, is it legal for two
19 individuals to make that transaction without going through a
20 police department or some other type of official --

21 A. **Not in the State of Maryland. Not for a pistol, no.**

22 THE DEFENDANT: No further questions.

23 THE COURT: I'll give the government a chance at
24 redirect.

25 MR. MORGAN: Nothing. Thank you.

1 THE COURT: Very well. Sir, thank you for your
2 testimony. You are excused.

3 The government's next witness.

4 MS. WRIGHT: Thank you, Your Honor. The government
5 calls Special Agent Rohsner.

6 THE COURT: Very well.

7 THE COURTROOM DEPUTY: Please step forward to the
8 witness stand, remain standing, and raise your right hand.

9 (Government witness **JAMIE ROHSNER** sworn.)

10 THE COURTROOM DEPUTY: You may be seated. Speak
11 clearly into the microphone, please state your name, and spell
12 your name for the record.

13 THE WITNESS: Sure. My name is special agent Jamie
14 Rohsner. First name is J-A-M-I-E. Last name is R-O-H-S-N-E-R.

15 THE COURTROOM DEPUTY: Thank you.

16 **DIRECT EXAMINATION BY MS. WRIGHT FOR THE GOVERNMENT**

17 BY MS. WRIGHT:

18 Q. Good morning, ma'am.

19 A. **Good morning, ma'am.**

20 Q. How long have you been a special agent with ATF?

21 A. **I've been a special agent with ATF since April of 2017.**

22 Q. And as a reminder for folks, did you work in law
23 enforcement before joining ATF at all?

24 A. **I did. I worked for the Montgomery County Police**
25 **Department.**

1 Q. And how long did you work for Montgomery County?

2 A. **Approximately two years.**

3 Q. Have you received training as part of your work,
4 including on firearms and controlled substances?

5 A. **I have.**

6 Q. And has the controlled substance training included
7 training regarding identifying indicia of distribution and
8 manufacturing of controlled substances?

9 A. **Yes, ma'am.**

10 Q. Have you been involved in both drug and gun
11 investigations as part of your duties with ATF?

12 A. **Yes, ma'am.**

13 Q. And were you present for the execution of the search
14 warrant at the defendant's home on December 5, 2018?

15 A. **I was.**

16 Q. And it's correct that you testified about that at trial
17 in some additional detail as well?

18 A. **That's correct.**

19 Q. Now, in addition to the items that you discussed in your
20 trial testimony, did you identify or help identify anything in
21 the defendant's room that you understood as indicative of
22 distribution, or possession with intent to distribute
23 controlled substances, based on your training and experience?

24 A. **I did, yes.**

25 Q. And could you describe briefly what those types of things

1 were for the Court?

2 A. Sure. I found a scale on the dresser, which is commonly
3 used by individuals who are distributing narcotics, to weigh
4 their drugs and make sure that they're getting the correct
5 price for what they're providing.

6 Q. And were you involved at all in the search of the
7 backpack -- locating or search of the backpack that Special
8 Agent Szakolczai described?

9 A. Yes.

10 Q. And was there anything of interest to you in that
11 backpack?

12 A. Yes. There were various items that are used for the
13 production of crack cocaine. There was residue on Pyrex and
14 another brownish-color bowl. There were also different sifting
15 materials and a milk frother, which could absolutely be used by
16 a drug distributor to produce crack cocaine.

17 Q. And were some batteries, I guess, seized that also
18 appeared to have residue from in the residence?

19 A. Right, there were two batteries that were found to have
20 narcotic residue on them. They were also found from the
21 residence and, in the packaging, which I recently reviewed,
22 there were instructions for a milk frother -- that's a hard
23 thing to say -- and, again, I had testified that the milk
24 frother was recovered in Mr. Faison's room.

25 Q. And where, as best you recall, approximately, did you

1 locate that backpack?

2 **A. In Mr. Faison's room.**

3 MS. WRIGHT: I will show -- first is two pages that
4 have been marked for identification as Government's Exhibit 4
5 to see if Ms. Rohsner recognizes those, if I may?

6 THE COURT: Sure.

7 BY MS. WRIGHT:

8 Q. And do you recognize those as photographs taken from the
9 search of Mr. Faison's room?

10 **A. I do.**

11 MS. WRIGHT: Your Honor, may we have the admission of
12 Government's Exhibit 4, please?

13 THE COURT: Sure.

14 BY MS. WRIGHT:

15 Q. Looking at the first page of those photographs, can you
16 please describe for the Court where we're looking and what
17 we're looking at?

18 **A. Sure. So this black box-type object with AWS on top is a**
19 **digital scale, which is commonly used by drug distributors, as**
20 **I previously mentioned. It's also placed on top of a Fred's**
21 **range information handout paper, and I had previously testified**
22 **during the trial that there was a bag from Fred's Outdoors and**
23 **a receipt. So this appears to be the same logo from that**
24 **material. I would understand range information to represent a**
25 **shooting range.**

1 Q. And then the second page photograph, what is this?

2 A. **This is the dresser that we -- where that scale was**
3 **found.**

4 Q. Thank you.

5 MS. WRIGHT: Your Honor, if I may, I'll hand Special
6 Agent Rohsner -- just to avoid going back and forth so much,
7 for which I apologize -- what I've marked as Government's
8 Exhibit 5 through 9 for her to take a look at, and we'll talk
9 about each of those.

10 THE COURT: If it's easier, you can just put it on
11 the screen. There's no jury over there. If I exclude it for
12 some reason, I can discount it.

13 BY MS. WRIGHT:

14 Q. So looking first -- I guess before we look at the first
15 exhibit, were items -- to your knowledge, based on your
16 familiarity with this investigation, were items sent to the
17 Prince George's County drug lab to be tested in this case?

18 A. **Yes.**

19 Q. And did that include various of the items that we've been
20 talking about already?

21 A. **Yes.**

22 Q. And looking at Exhibit 5. I'll just flip through those
23 pages. Do you recognize what we are looking at here?

24 A. **Yes.**

25 Q. Can you describe for the --

1 MS. WRIGHT: Well, Your Honor, I'd move the admission
2 of Government's Exhibit 5.

3 THE COURT: Very well.

4 BY MS. WRIGHT:

5 Q. Can you describe for the Court, please, what we're
6 looking at?

7 A. Sure. So each of these drug analysis documents, the
8 first top one is the laboratory analysis report, as you can
9 see. This is the result from the lab. Whereas the second page
10 is the request from the officer who submitted the request for
11 analysis. This first one pertains to the glass bowl with the
12 handle, which is really more like a pot, we've determined, but
13 it was taken from the backpack from Mr. Faison's room.

14 Q. Thank you. And then --

15 A. And it had a positive conclusion.

16 Q. That's the important question.

17 A. Yes.

18 Q. I'm sorry, I cut you off though. What was the --

19 A. Yeah, so the conclusion listed here is a positive result
20 for cocaine base residue.

21 Q. And then turning to page 3, can you describe what the
22 Court is looking at here?

23 A. Yes. This is another analysis report from the drug lab,
24 and this was of the two AA batteries that had residue, and this
25 was positive conclusion for cocaine.

1 Q. And based on your knowledge of this investigation, did
2 you become aware if law enforcement also searched the bedroom
3 in the residence of Larry Newman, Jr.?

4 A. Yes.

5 Q. And just to be clear for the record, did you personally
6 search that bedroom?

7 A. No, ma'am, I never entered that room.

8 Q. But is it fair to say you've reviewed photographs, as the
9 case agent, from the search of that bedroom?

10 A. Yes, that's correct.

11 Q. And based on your familiarity with the investigation, was
12 a firearm found in that bedroom?

13 A. Yes.

14 Q. And do you know if that firearm had any ammunition with
15 it?

16 A. It did, yes. It had -- I believe it had one round.

17 Q. One round loaded? It was loaded with one round?

18 A. I would have to refresh my recollection, but I believe
19 so.

20 Q. And were there any controlled substance-related findings
21 in that bedroom of Mr. Newman, Jr.?

22 A. Yes.

23 MS. WRIGHT: And then I will show what I've marked as
24 Government's Exhibit 6, which is a set of photographs, and I'll
25 flip through those and see if Special Agent Rohsner recognizes

1 those and can describe what they have once we know she
2 recognizes them.

3 THE WITNESS: Sure, this is the photograph of --

4 BY MS. WRIGHT:

5 Q. I guess, first, Special Agent Rohsner, is it fair to say
6 these are photographs from the search, specifically as to Larry
7 Newman, Jr.'s, room that you've reviewed as part of your work
8 as the case agent in this case?

9 A. Yes.

10 MS. WRIGHT: And, Your Honor, I do move the admission
11 of Government's Exhibit 6, please.

12 THE COURT: Very well.

13 BY MS. WRIGHT:

14 Q. Then looking, first, at the first page of that stack of
15 photographs, can you please describe what we're looking at
16 here?

17 A. Sure. This is the firearm that was recovered from the
18 back bedroom. This is a Colt handgun.

19 Q. And when you refer to the back bedroom, is that what law
20 enforcement confirmed as Larry Newman, Jr.'s, bedroom?

21 A. That's correct.

22 Q. And looking at the second page of the photographs, what
23 are we looking at?

24 A. This is the same handgun. It had, at this point, been
25 unloaded, and the one round has been extracted.

1 Q. And looking at the third and fourth pages, what are we
2 looking at here?

3 A. The first was just the black bag before it was opened.
4 The second is the opened bag that I believe the defense has
5 already showed a picture similar to this.

6 Q. And what, generally, did law enforcement find in this
7 bag?

8 A. Drugs.

9 Q. And looking at the next page, page 5 of this packet.

10 A. So it's my understanding that once that bag was found,
11 that these items were retrieved from that bag and placed on
12 this bench or whatever that black thing is.

13 Q. And then the last page, do you recognize what that was?

14 A. Yes, these are glass bottles or vials. They're commonly
15 used to store PCP.

16 Q. Special Agent Rohsner, were these items, to your
17 knowledge, also sent to the Prince George's County drug lab for
18 analysis?

19 A. Yes, they were.

20 Q. And have you reviewed reports received back, reflecting
21 the results of some of that analysis?

22 A. Yes.

23 Q. And I've marked those as Government Exhibit 7. Do you
24 recognize the pages that I'm flipping through here?

25 A. Yes.

1 MS. WRIGHT: Your Honor, we move the admission of
2 Government's Exhibit 7.

3 THE COURT: Very well.

4 MS. WRIGHT: I'm sorry, Your Honor?

5 THE COURT: Very well.

6 MS. WRIGHT: Thank you.

7 BY MS. WRIGHT:

8 Q. Turning to the first page, can you describe, basically,
9 as we flip through, what the findings were by the lab, as you
10 understand them, with respect to these items from Mr. Newman,
11 Jr.'s, room?

12 A. Sure. I will note that this is an amended report that
13 has been provided by the lab. However, the first item is a
14 sample that was tested and found to contain cocaine.

15 The second item -- I'm not sure what exactly your
16 question is, but all of the items were tested. The final item,
17 a portion of which was tested, to be found positively
18 containing cocaine or cocaine -- I'm sorry, powder cocaine or
19 crack cocaine.

20 Q. And I'll ask just briefly, in terms of the amount of
21 cocaine that's listed there, that's approximately 40 grams that
22 was in the first item; is that correct?

23 A. That's correct.

24 Q. And turning to the cocaine base that's also reflected
25 there, is it fair to say that your understanding is law

1 enforcement found in those bags 547 individual baggies of crack
2 cocaine?

3 **A. That's correct.**

4 Q. And those, again, were some of the items depicted in the
5 photograph we were just looking at?

6 **A. That's my understanding, yes.**

7 Q. And then turning to page 3, were there additional drug
8 findings that the lab reflected there?

9 **A. Correct. This page shows the PCP that was recovered.**
10 **The top part was the glass bottle containing PCP, and there was**
11 **a positive result. The second one was not analyzed.**

12 Q. And the second one, is it fair to say that's part of
13 your -- well, your understanding was the individual plastic
14 vials of suspected PCP?

15 **A. That's correct. I believe, as Special Agent Szokolczai**
16 **had mentioned prior, these vials were plastic and had been**
17 **basically eaten away by PCP.**

18 Q. Is it fair to say that's between the time they were
19 seized and when the lab was able to analyze them?

20 **A. Yes.**

21 Q. And do you know from your review of -- how many vials of
22 the miniature plastic vials of PCP there were, approximately?

23 **A. It was approximately 100.**

24 Q. And then the last lab report there, just reading it, was
25 that an additional finding of an item containing crack cocaine?

1 **A. That's correct.**

2 Q. During the course of your involvement in the
3 investigation, did you have occasion to examine reports
4 pertaining to the Kimber firearm and the fact that it was
5 stolen?

6 **A. Yes.**

7 Q. And did you come to have an understanding as to the date
8 when it had been stolen?

9 **A. Yes. It was stolen on June 13, 2008, and it was actually**
10 **stolen from an FFL. It was one of 30 some guns that had been**
11 **stolen.**

12 Q. And where was that FFL located, as best you recall?

13 **A. I don't recall the name of the FFL, but it was in Glen**
14 **Allen, Virginia.**

15 Q. Now, Special Agent Rohsner, were there a -- supplementing
16 the ones played at trial, were there a few additional clips
17 from the defendant's jail calls that you reviewed in connection
18 with testifying here today?

19 **A. Yes, I did.**

20 Q. Okay. And is it your understanding those have been
21 copied to the two CDs which I have marked as Government's
22 Exhibit 8 and 9?

23 **A. I believe so, yes. I'd recognize them by the sound of**
24 **them.**

25 MS. WRIGHT: Your Honor, if I may have a few moments

1 to wake up my computer, which had fallen asleep. I apologize.

2 THE COURT: Sure.

3 MS. WRIGHT: May I ask the clerk to not display it
4 yet as I sign in? Thank you very much.

5 BY MS. WRIGHT:

6 Q. Special Agent Rohsner, with respect to the first clip, is
7 it fair to say that you reviewed and helped prepare a clip from
8 the first call that the defendant made, upon his arrest, to his
9 family, which was on September 5, 2018?

10 A. Yes.

11 Q. And the clip prepared that you reviewed reflects the
12 beginning of that call and some initial conversation?

13 A. Yes.

14 Q. And based on your knowledge and review of this call, who
15 was Mr. Faison speaking to?

16 A. If I'm remembering the correct clip, he was speaking to
17 Larry Newman, Jr., among other people at the time.

18 Q. Okay. Is it fair to say additional people came on the
19 call at other points in the call?

20 A. Yes.

21 Q. If I may play the first clip, which is from Government's
22 Exhibit 9.

23 (Audio recording played.)

24 For the record, I'm stopping that at 2:49.

25 And then turning to the second clip, is there a time,

1 based on your review of the jail calls, when you heard the
2 defendant speak about silencers.

3 **A. He made mention to silencers and flashlights, yes.**

4 **Q.** And was that in March of 2019?

5 **A. Yes.**

6 **Q.** And is it your understanding that he was partly, as the
7 preface for this call, explaining an argument being made by the
8 government?

9 **A. Yes.**

10 MS. WRIGHT: Your Honor, I'll play clip 2 now, if I
11 may, from Government's Exhibit 9.

12 (Audio recording played.)

13 BY MS. WRIGHT:

14 **Q.** And turning to the third clip from Government's Exhibit
15 9, from your review of the jail calls, did you hear at some
16 point commentary by the defendant indicating that he would go
17 to the police if something like the incident happened again?

18 **A. Yes.**

19 **Q.** And is that part of one of the clips that you reviewed
20 before this hearing?

21 **A. Yes.**

22 MS. WRIGHT: Your Honor, I'll play clip 3 from
23 Government's Exhibit 9.

24 (Audio recording played.)

25 BY MS. WRIGHT:

1 Q. And, finally, Special Agent Rohsner, did you also have
2 occasion to review a clip from -- or part of the jail calls and
3 a clip from October 6, 2019?

4 A. Could you tell me what the clip --

5 Q. Did you review a clip pertaining to -- or part of a jail
6 call, which became a clip, pertaining to an altercation that
7 the defendant nearly got into at the jail?

8 A. Yes, I recall listening to that call.

9 MS. WRIGHT: Your Honor, if I may, I'll just play
10 that from Government's Exhibit 8.

11 (Audio recording played.)

12 BY MS. WRIGHT:

13 Q. Just a final topic, Special Agent Rohsner. During the
14 course of your involvement in the investigation, did you have
15 occasion to review the recorded interview of Larry Newman, Sr.,
16 the defendant's father, on the date of the defendant's arrest?

17 A. I've reviewed at least some of it, yes.

18 Q. And at least for the parts of it that you have reviewed,
19 did Larry Newman, Sr., ever refer to an intent to go to the
20 police that day?

21 A. Not that I can recall.

22 Q. And in what you reviewed, did he describe or list the
23 people who were living at the house on September 5, 2018?

24 A. Yes. He identified each bedroom with the individual who
25 was staying in that bedroom.

1 Q. And how many people, total, did he say were living at the
2 house at that point?

3 A. I believe he said that four people were residing at the
4 house.

5 Q. Do you recall who those four specifically were?

6 A. Yes. It would be Larry Newman, Sr., his wife
7 Mrs. Newman, I believe it was Darlene, and Larry Newman, Jr.,
8 and Burudi Faison.

9 Q. Thank you, ma'am. I have nothing further at this time.

10 THE COURT: Cross.

11 MS. WRIGHT: Oh, I apologize, Your Honor. To the
12 extent it wasn't apparent, I do move the admission of
13 Government's Exhibit 8 and 9.

14 THE COURT: Very well.

15 MS. WRIGHT: Thank you.

16 THE COURT: Cross-examination, Mr. Faison.

17 **CROSS-EXAMINATION BY THE DEFENDANT**

18 BY THE DEFENDANT:

19 Q. Agent, you were there for the search of my room from the
20 initial stop?

21 A. Upon execution of the search warrant, I searched your
22 room, yes.

23 Q. Were you there when this particular item on the screen
24 was found?

25 A. I'm sorry, say that again.

1 Q. Were you there when this particular item on the screen
2 was found?

3 A. Yes. This is the backpack, I believe, yes.

4 Q. Could you tell us where it was actually found at?

5 A. Generally speaking, yes, I can tell you. If you were
6 walking into the room, and the bed is in front of you, to your
7 left is the large dresser. It was in the general area of the
8 corner to your left.

9 Q. Was there anything else in that corner?

10 A. There were a lot of things in the entire room, yes.

11 Q. No, in the corner where this bag was found.

12 A. Yes, there were other things. I don't recall -- I
13 believe there might have been -- yeah, there were several
14 things.

15 Q. Was this bag found in plain view?

16 A. I don't remember.

17 Q. The glass that you see, were there any fingerprints taken
18 from this glass?

19 A. I'm not aware of any fingerprint analysis taken.

20 Q. Were any fingerprint analysis done on any of the glasses
21 that you all found?

22 A. Not that I'm aware of.

23 Q. In the book bag, was there any other identifying
24 information that you could have tied to me?

25 A. Not that I remember.

1 Q. In the dresser drawers, other than the drawers, the one
2 drawer that you photographed with the medicine, was there
3 anything in the other drawers that could be identified to me?

4 A. Not that was recovered.

5 THE DEFENDANT: Your Honor, let the record reflect
6 we're now looking at Government Exhibit 6, page 2.

7 THE COURT: Very well.

8 BY THE DEFENDANT:

9 Q. Do you recognize this firearm?

10 A. Yes.

11 Q. Could you tell the Court what caliber firearm this is?

12 A. I believe it was a .45 caliber, but I would have to look
13 at paperwork to absolutely confirm that, because, again, I
14 didn't search that room.

15 Q. And this was found in the other room.

16 A. Correct.

17 THE COURT: When you're saying the other room, can
18 you be more specific?

19 THE WITNESS: The other room being the room that was
20 previously identified as belonging to Larry Newman, Jr.

21 THE COURT: Thank you.

22 BY THE DEFENDANT:

23 Q. And the bullets found inside of my room, would these
24 bullets fit this firearm also?

25 A. I would like to confirm that this is actually a .45

1 caliber handgun before I testify to that.

2 Q. This is Defense Exhibit BF 1301 -- I'm sorry, BF 0131.
3 Do you recognize this report?

4 A. I do, yes.

5 Q. Down at AT 14, could you read what it says there?

6 A. Yes, it appears that the Colt is, in fact, a .45 caliber
7 handgun.

8 Q. So the bullets found in my room would also fit this
9 firearm.

10 A. A .45 caliber round could fit in a .45 caliber handgun,
11 generally speaking, yes.

12 THE DEFENDANT: Your Honor, for the record, BF 0131
13 would be Defense 2.

14 THE COURT: Very well.

15 BY THE DEFENDANT:

16 Q. Can you describe what the drugs are sitting on?

17 A. No. I mean, I wasn't there in that room, so I can't
18 really tell you what that was.

19 Q. Inside of my room, was this particular item located in
20 that room?

21 A. What particular item?

22 Q. The item that the drugs are sitting on?

23 A. I don't believe -- I don't know what it is.

24 Q. Do you recognize it as being in the room when you did the
25 search of my room?

1 **A. No.**

2 THE COURT: What exhibit number are we looking at
3 now?

4 THE DEFENDANT: Government Exhibit 6, page 5.

5 BY THE DEFENDANT:

6 Q. If you can look down in the right-hand corner, could you
7 describe what you see there?

8 **A. The lower right-hand corner or the upper right-hand**
9 **corner?**

10 Q. The lower left-hand corner.

11 **A. It appears to be an electronic device.**

12 Q. Would this be the black Samsung tablet that you all
13 recorded as being found in my room?

14 **A. I couldn't speculate as to that. I didn't take the**
15 **picture.**

16 Q. At AT 10, does that say "Samsung tablet black"?

17 **A. It does.**

18 Q. And it's only showing one?

19 **A. Yes.**

20 Q. So did either of you who checked my room remove a tablet
21 from that room, or was the tablet taken from another room?

22 **A. No, a tablet was absolutely recovered from your room. I**
23 **can't say whether or not there was a tablet in Newman, Jr.'s,**
24 **room or not. There may have been.**

25 THE DEFENDANT: Your Honor, I'd like to show

1 Government Exhibit 1, page 12.

2 BY THE DEFENDANT:

3 Q. The item in the middle of the page, could you describe
4 that to us?

5 A. Are you talking about the bag?

6 Q. Yes.

7 A. Again, I did not find this, but it is my understanding
8 that Special Agent Szokolczai found that bag and that it
9 contained controlled dangerous substance.

10 Q. Do you know which substance was inside the bag?

11 A. I believe it was PCP, but that would be a question for
12 Mr. Szokolczai.

13 Q. Did you see the items that were inside the bag?

14 A. I believe so.

15 Q. Did they resemble the items that were shown in Government
16 Exhibit 2?

17 A. I've been shown a lot of exhibits. I'm assuming you're
18 referring to the --

19 Q. The vials.

20 A. Found in what room?

21 Q. In Larry Newman's room.

22 THE COURT: My understanding is the six vials in --
23 I'm just trying to move this along. The six vials found in
24 Mr. Faison's room were similar to the vials found in
25 Mr. Newman's room; is that correct?

1 THE WITNESS: It appeared to be that way, yes.
2 Similar in packaging, yeah.

3 THE COURT: But there were more of them found in
4 Mr. Newman's room than Mr. Faison's room.

5 THE WITNESS: So in Mr. Newman's room, there was an
6 actual glass vial with a large quantity of PCP. That was not
7 found in Mr. Faison's room. But if I'm understanding
8 correctly, there were smaller plastic vials found in each room.
9 BY THE DEFENDANT:

10 Q. As to the phone calls, you stated that the call -- I'm
11 not actually sure which call it comes from, but it mentions
12 silencers, flashlights with no batteries in it. This
13 particular conversation was referencing what the government was
14 saying about this incident; is that correct?

15 A. Yes. It seemed in that call that you were discussing a
16 government argument about silencer parts.

17 Q. In the call about the incident in the institution, did
18 you listen to that entire call?

19 A. No, I have not.

20 Q. So you don't know the gist of the entire conversation.

21 A. No.

22 THE DEFENDANT: No further questions, Your Honor.

23 THE COURT: I think I know the answer to this, but I
24 just don't know if anyone has said it. Based on your
25 experience, would the amount that was found in Mr. Faison's

1 room, just by itself, would you consider that -- and I know you
2 haven't been formally declared as an expert here, but based on
3 your experience, would that, by itself, be enough to be
4 considered distribution quantity in your estimation, the six
5 vials of PCP?

6 THE WITNESS: The way that they were packaged were
7 indicative of distribution to multiple consumers.

8 THE COURT: Do you have a sense -- and I actually
9 just don't know the answer to this. How many doses, if dose is
10 even the right word, would be found in each vial?

11 THE WITNESS: Sure. So I don't know that I could
12 really say that; however -- I don't know how familiar you are
13 with the use of PCP, but typically --

14 THE COURT: Not from personal experience, but.

15 THE WITNESS: Right. So PCP is generally --
16 marijuana or a regular cigarette is dipped into PCP and then
17 smoked. So it takes a very little amount to be considered a
18 dose, dosage unit. I can definitely say that there was more
19 than one dose in the amount that was in Mr. Faison's room.

20 THE COURT: But I guess my question is each vial
21 would have -- you could dip multiple cigarettes, whatever it is
22 you're using, into each vial. And so if you're calling that a
23 dosage unit, you could get more than one dose from each vial.
24 I guess that's what I'm trying to ask. If you don't know, you
25 don't know.

1 THE WITNESS: Yeah, I'm not sure I can answer that
2 question because, as special agents, we don't have an actual
3 measurement due to the fact that the stuff just ate it all
4 away.

5 THE COURT: So you can't say that for sure.

6 THE WITNESS: Yes, I cannot.

7 THE COURT: Okay. Ms. Wright. Or Mr. Morgan. I
8 forgot whose witness it was.

9 MS. WRIGHT: It was mine, Your Honor. We don't have
10 any redirect.

11 THE COURT: All right. You may retake your seat.
12 Thank you.

13 THE WITNESS: Thank you.

14 THE COURT: I may have lost count of how many
15 witnesses the government said they have. Do you have another
16 witness?

17 MS. WRIGHT: No, that was our final witness, Your
18 Honor. So we would -- in terms of the evidence, we would rely
19 on that testimony and what we've submitted as the exhibits here
20 and with the sentencing memo.

21 THE COURT: Very well. Does Mr. Faison have any
22 witnesses that you want to call as it relates to any of these
23 issues?

24 THE DEFENDANT: One moment.

25 THE COURT: Sure.

1 THE DEFENDANT: Your Honor, if I may, I'd like to
2 call Angela Griffin, the probation officer.

3 THE COURT: For what purpose do you wish to call the
4 probation officer?

5 THE DEFENDANT: Well, during the times that she came,
6 she would do walk-thru's, and she can explain to the Court what
7 she saw during those times.

8 THE COURT: Is that just for the purpose of
9 establishing that during those times, she did not see any
10 illicit activity?

11 THE DEFENDANT: Yes.

12 THE COURT: I don't feel the need to call her for
13 that purpose. The only evidence that is before the Court is
14 what was found on that day. If you want to argue to me that
15 that's -- the government certainly can't show to me that you
16 had it on other days, so I'm not going to assume that you did
17 or didn't.

18 I don't like to put the probation officer on the stand as
19 it relates to their official duties for the court. So if
20 that's what you're proffering to me that you're trying to get
21 out of that, I'm not inclined to allow that. We can
22 certainly -- if you're proffering to me that on the times she
23 came to visit you, there were no illicit substances found, I
24 will accept that as a proffer from you.

25 THE DEFENDANT: Yes.

1 THE COURT: All right. Any other witnesses?

2 THE DEFENDANT: No.

3 THE COURT: All right. Just give me one moment, and
4 then I'll hear argument on some of these issues. Just give me
5 a moment. I wanted to look at something I just pulled up.

6 So we have -- having now heard all the evidence, we have
7 a number of issues related to the guidelines to address.

8 I should have said this at the outset, and I apologize
9 for not. Mr. Patel, I don't know if you were planning on just
10 making argument on your issue and then going about your day. I
11 apologize. It didn't occur to me until we were already --

12 MR. PATEL: Oh, no problem. That's okay.

13 THE COURT: Or I would have started the hearing by
14 making that suggestion. So we can address that issue first,
15 and then we'll hear argument on the remaining issues.

16 I guess since it's -- well, first, though, I should ask
17 Mr. Faison. As the government indicated in its papers, the
18 federal defender does not represent you in this case. They're
19 operating as standby counsel in this case. The federal
20 defender -- because this is an issue that comes up with many of
21 their clients, so they have an interest in how I rule and how
22 other judges rule on this issue -- wants to sort of intervene
23 for the purposes of just making this argument on this issue
24 that relates to whether or not I should consider the attempt
25 drug distribution count -- excuse me, the attempt conviction in

1 your past as something that enhances your guidelines, your
2 offense level from a 20 to a 22.

3 So I guess I should ask you first whether or not you are
4 comfortable with them intervening for that purpose. It doesn't
5 mean that they represent you. It just means that they're
6 providing argument, presumably in support of your position. So
7 they don't become your lawyers. You're still your own lawyer,
8 but Mr. Patel would be willing to make legal arguments on that
9 one issue for you.

10 THE DEFENDANT: Well, from my understanding,
11 Mr. Patel was supposed to be coming in as -- how do you
12 pronounce that? *Amicus cure*?

13 THE COURT: I have trouble pronouncing that too.

14 THE DEFENDANT: So for that particular issue, I have
15 no problem with him making the argument.

16 THE COURT: That's fine. So, Mr. Patel, I'll hear
17 from you.

18 MR. PATEL: Thank you.

19 THE COURT: I guess my first question -- I'm sure
20 you're going to address it, but I just want it to be addressed
21 first -- is why shouldn't I just follow *Dozier*? It's a Fourth
22 Circuit case. I know you address it, but I guess that's where
23 we should start.

24 **ARGUMENT BY MR. PATEL FOR THE DEFENDANT**

25 MR. PATEL: I can start with that, Your Honor. So

1 *Dozier*, the issue was not briefed or disputed or addressed, so
2 the --

3 THE COURT: But the core question -- so the argument
4 that you put forward isn't addressed, right?

5 MR. PATEL: Yes.

6 THE COURT: But the core question of whether attempt
7 qualifies was answered. And as a district court, am I only
8 bound by Fourth Circuit cases where the exact argument being
9 made to me was addressed by the Fourth Circuit? Or if they've
10 answered the question as to whether or not attempt qualifies,
11 look, you can appeal this case and present them with a new
12 argument, but do I get to say, nope, I heard a different
13 argument and so I think you got it wrong --

14 MR. PATEL: Yes, Your Honor, because it's a very
15 substantive, different argument. The only argument that was
16 raised in *Dozier* was that there was not a generic attempt.

17 Now, I understand your concern, and that's why I think
18 *U.S. versus Norman* is really, really, really important on what
19 constitutes a holding and what does not, because *Norman* says
20 very clearly that a passing observation on an issue that was
21 neither briefed nor disputed does not constitute a holding, and
22 then it cites to several cases which say that if a court just
23 assumed an issue without actually deciding it, that's not a
24 holding --

25 THE COURT: But are you suggesting that *Dozier* did

1 not hold that attempt satisfied 4B -- was it 4B1.2?

2 MR. PATEL: I think what it held was that 4B1.2, that
3 the West Virginia attempt that was at issue was a generic
4 attempt.

5 So it's helpful here to look at what was happening in
6 *Norman*. So in *Norman*, the actual issue was whether or not an
7 846 conspiracy qualified as a generic conspiracy. The
8 government, just like they're doing now, kept saying to this
9 Court, and every other court, you cannot hold that an 846
10 conspiracy is not a controlled substance offense because
11 there's this case, *U.S. versus Kennedy*.

12 In *U.S. versus Kennedy*, which came before *Norman*, the
13 Fourth Circuit had held explicitly that an 846 conspiracy was a
14 controlled substance offense, but the Fourth Circuit in *Norman*
15 said we did not decide the generic conspiracy issue, even
16 though we had held previously in *U.S. versus Kennedy* that an
17 846 conspiracy is a controlled substance offense. There, the
18 issue was different. The issue was whether or not the
19 commission had any authority at all to ever include conspiracy
20 in the career offender guideline under the enabling statute,
21 and the Fourth Circuit held conclusively that it did and that
22 846 conspiracy was a controlled substance offense.

23 So many times, Your Honor, before *Norman* came out, we
24 would argue this to the district courts, and the government
25 kept saying *U.S. versus Kennedy* does not allow you to find

1 otherwise, even though the actual issue we're raising about
2 generic conspiracy was not disputed or addressed in *Kennedy*.
3 So the Fourth Circuit, in *U.S. versus Norman*, said Kennedy does
4 not control, even though the Fourth Circuit held previously
5 that 846 conspiracy was a controlled substance offense.

6 So if you look at *Norman*, *Norman* has really clarified for
7 us, like, what is controlling and what is not.

8 There's another case, U.S. --

9 THE COURT: Is there a distinction -- maybe there's
10 not. Is there a distinction between the Fourth Circuit saying
11 that in *Norman* and you asking me as a district court to say
12 that?

13 MR. PATEL: No, because I think the Fourth Circuit
14 was commenting on what the law was in the circuit that district
15 courts are to follow, and the Fourth Circuit wasn't saying --
16 because one panel can't overrule another panel either.

17 So I think it's very clear here that *Dozier* has not
18 addressed this issue. There's a footnote in the case that
19 acknowledges that that issue was not presented to the court, so
20 it wasn't going to decide it.

21 So these assumptions that are made, Your Honor, there's
22 case after case --

23 THE COURT: But the court in *Dozier* had the same
24 language of 4B1.2 before it, correct? Presumably, the judges
25 do their job, they looked at the guideline and determined that

1 it was sufficient.

2 MR. PATEL: No, because, Your Honor, the court said
3 explicitly this is what the -- the defendant had not raised
4 that issue, so it wasn't going to address it. So it did not
5 address it at all. So I don't know how you can say that *Dozier*
6 decided the issue when you look at *Norman*, and there was the
7 same analogous situation going on.

8 And there's various parentheticals and cases that *Norman*
9 cites to for this issue. One of them is *U.S. versus McLeod*.
10 In that case, the Court had previously said that an offense
11 qualifies as a generic burglary, but then said, oh, it was just
12 a passing statement, so the specific issue -- I think it was
13 post-*Mathis* and *Descamps* -- had not been decided. So the Court
14 here says "expressly rejecting the view that an observation on
15 an issue not briefed and argued to the Court in an earlier case
16 constitute" --

17 THE COURT: Slow down, please.

18 MR. PATEL: Pardon me?

19 THE COURT: Slow down.

20 MR. PATEL: Oh, I'm sorry. Okay. "Constitute a
21 holding on that issue in refusing to follow that passing
22 observation."

23 There's another case the Fourth Circuit cited to, *U.S.*
24 *versus Hemingway*, which says "holding that a previous case
25 which assumed a sentencing enhancement applied did not dictate

1 that outcome because the issue was not contested."

2 These are all in *Norman* itself.

3 The court also cites to *Brecht versus Abrahamson*, a
4 Supreme Court case, which says "since we have never squarely
5 addressed the issue and have, at most, assumed it, we are free
6 to address the issue on the merits."

7 So I think what the Fourth Circuit did in *Dozier* was
8 assume that the commentary was valid because it wasn't raised,
9 but it didn't decide that issue.

10 So if you look at *Norman*, there is no way that we can say
11 *Dozier* has decided the issue, because if that -- it can't be
12 reconciled with *Norman*, because *Norman*, there was also a case
13 previously that had said conspiracy qualifies, and the Fourth
14 Circuit said no, that issue hadn't been decided. And that
15 applies to district court or the circuit court. I don't know
16 why it would be any different. The Court wasn't saying, you
17 know, because it's the Fourth Circuit, we're the only ones that
18 are able to decide what's controlling and what's not. That's
19 not what the Court said in *Kennedy*, so there isn't that -- or,
20 I'm sorry, in *Norman*. So there isn't that distinction.

21 So does that answer your question --

22 THE COURT: It does.

23 MR. PATEL: Okay. So, Your Honor, so our argument
24 here is that an attempt is not a controlled substance offense
25 because the text of 4B1.2 only includes completed offenses and

1 leaves no room for inchoate offenses. There are no words in
2 the statute, Your Honor, which can be interpreted to include
3 inchoate offense.

4 Your Honor, this is very different from the armed career
5 criminal act. In the armed career criminal act, we have the
6 word "involving." Involving manufacturing, distributing and
7 possessing with intent to distribute, and courts have said it's
8 because of that word "involving." That's expansive. It means
9 related to or connected to. That means conspiracies and
10 attempts can qualify.

11 But we don't have that here. Because we don't have that
12 here, then what the commentary is doing is adding to the text.
13 It's not interpreting. If there's no words to interpret, it
14 can't be interpreting the text. It's adding to the text. It's
15 expanding the text, and commentary cannot do that. The Supreme
16 Court told us that in *Stinson*. The Fourth Circuit has told us
17 that in *U.S. versus Shell*, the commentary cannot add; it can
18 only interpret.

19 Now, there's only two circuits, Your Honor, that have
20 done a deep dive on this issue, and both of those circuits
21 agree with us on this. The D.C. Circuit in *Winstead* and this
22 en banc Sixth Circuit in *Havis* unequivocally and forcefully
23 held that attempts cannot qualify under 4B1.2, and that the
24 commentary's inclusion of attempts and inchoate offenses
25 conflicts with the text.

1 So the D.C. Circuit held, quote, there's no question
2 that, as appellant points out, the commentary adds a crime,
3 attempted distribution, that is not included in the guideline.
4 And the court even found counsel ineffective for failing to
5 make the argument, even though there was no decision beforehand
6 where the D.C. Circuit had found that the commentary conflicts
7 with the text.

8 Also, what's compelling here is that the Sixth Circuit --
9 I've never seen this before -- en banc, was so sure of its
10 position -- this means that every judge in the Sixth Circuit,
11 and it has some pretty conservative judges. It held that
12 attempts can't qualify even without oral argument. There was
13 no oral argument. They did it on the briefs.

14 Alternatively, Your Honor, if this Court believes that
15 there is some ambiguity about whether the text includes or
16 lists, includes, encompasses attempts or not, then this Court
17 should follow Judge Bredar's decision in *U.S. versus Lisbon*,
18 where it was the exact issue. The government keeps saying
19 that, oh, that was different. It wasn't different. I made the
20 argument. It was the same argument. It wasn't dependent --

21 THE COURT: Was that conspiracy versus attempt?

22 MR. PATEL: Yeah, that was the only difference. But
23 there were two separate arguments there. Our first argument
24 was that the commentary conflicts with the text because no
25 inchoate offense can qualify. It wasn't particular to

1 conspiracy.

2 Yes, there was a second argument about generic conspiracy
3 not being generic, a RICO conspiracy, but the judge separately
4 ruled for that independently of this
5 commentary-conflicts-with-the-text argument. There really is
6 no difference in the arguments. So Judge Bredar didn't go as
7 far as *Havis* and *Winstead* but nonetheless said, look, under the
8 rule of lenity, this is a serious question, and I have
9 concerns; it's not clear to me; it's ambiguous; I'm going to
10 rule for the defendant under the rule of lenity.

11 THE COURT: But Bredar's case was after *Dozier*?

12 MR. PATEL: Judge Bredar's case was after *Dozier*, I
13 believe.

14 THE COURT: It wouldn't have mattered because it was
15 attempt but, yeah, just looking at the dates.

16 MR. PATEL: Yeah.

17 THE COURT: Okay.

18 MR. PATEL: And one thing to remember is that
19 Judge Bredar's case was also after *U.S. versus Kennedy*, right,
20 which had held that conspiracy qualifies, and the government
21 was arguing the same type of thing there. That wasn't a RICO
22 conspiracy, but it was an 846 conspiracy, and Judge Bredar
23 still ruled on this issue and held for -- and, actually, that
24 was the very first decision in the country on this issue --
25 recently on this issue.

1 So, Your Honor, I think that it's very clear -- so let me
2 now go into the text itself. So the text says "the controlled
3 substance offense means an offense under federal or state law,
4 punishable by imprisonment for a term exceeding one year, that
5 prohibits the manufacture, import, export, distribution,
6 dispensing of a controlled substance or possession of a
7 controlled substance with intent to distribute."

8 Now, the government focuses on the word "prohibits" and
9 somehow says that that's an elastic term, but I don't know how
10 prohibit is an elastic term. It's not. It's not an expansive
11 term, Your Honor. It's not like involving. Involving clearly
12 means connected to. It means that we can go beyond the list
13 that's in the text, but that's not true with respect to
14 prohibits.

15 This government made the same argument with respect to
16 prohibits in *Havis*, and the court said "the guideline's
17 boilerplate use of the term 'prohibit' simply states the
18 obvious, the criminal statute's prescribed conduct, but
19 prohibit doesn't mean related to or connected to."

20 The Blacks Law Dictionary on prohibit is also to forbid
21 by law, to prevent or hinder. There's nothing --

22 THE COURT: There's typically not a separate offense
23 that prohibits an attempt, right? Like, usually the offense
24 prohibits the manufacture, import, export, distribution, and
25 the attempt is just considered sort of an underlying -- another

1 way to complete that. And so --

2 MR. PATEL: Well, that's import -- so, here, Your
3 Honor, I think when you look at the federal code, attempt in
4 conspiracies are separate --

5 THE COURT: They are separate. That's fair.

6 MR. PATEL: They're in a separate statute. They're
7 in 21 U.S.C. 846. Now --

8 THE COURT: So that it's a separate offense.

9 MR. PATEL: Yes, it is a separate -- if you've been
10 convicted of attempt --

11 THE COURT: And lesser included was what I was
12 looking for before, but you're saying that's not true.

13 MR. PATEL: And I'll address that too. So if you've
14 been convicted of an attempt, you haven't been convicted of an
15 offense that prohibits manufacture -- so the list is referring
16 to completed offenses. So I think it's important to look at it
17 that way. You've been convicted of an attempt. You haven't
18 been convicted of an offense that prohibits the manufacture,
19 distribution, or possession with intent to distribute.

20 Now, of course, there has to be a substantial step toward
21 the underlying offense, right, but that doesn't mean you've
22 completed the underlying and that you're guilty of the
23 underlying offense under 841. So that's why it is a separate
24 offense.

25 And, also, Your Honor, with respect to attempt, the

1 government's argument is that anytime you have an offense
2 that's listed in the controlled substance offense or in the
3 crime of violence, we can just naturally assume it also
4 includes attempts. But there are several reasons why we can't
5 do that. Your Honor, first of all, the commission knows how to
6 include inchoate offenses in the text, and it did that in 4B1.2
7 in the crime of violence definition in the force clause. It
8 includes attempt there.

9 Also, Your Honor, it's important to look at *U.S. versus*
10 *James*. This is a Supreme Court case in which the Supreme
11 Court -- it was in the violent felony context, but the Supreme
12 Court said a burglary -- an attempted burglary is not burglary.
13 So as the Court said in *Winstead*, attempted distribution is not
14 distribution any more than attempted burglary is burglary.

15 Also, Your Honor, the government's argument about we can
16 just assume that the lesser included qualifies, it really
17 conflicts with the well-settled principles of the categorical
18 approach. Under the categorical approach, when a prior offense
19 is broader than the offense listed in the federal crime of
20 violence or controlled substance statute, there's not a match
21 and it doesn't qualify.

22 Here, we have broader offense, right? The attempt has
23 broader elements. It requires less than the actual offense
24 that's listed, which is the completed offense of manufacturing,
25 distributing or possessing with intent to distribute. So under

1 the categorical approach, it doesn't make any sense. It would
2 turn it upside down if we now started saying that these broader
3 offenses now do qualify.

4 Additionally, Your Honor, it would lead to an absurd
5 result because if that were true, then the extent of the
6 government's argument is that even a possession would qualify.
7 Because if you look at the offenses, one of the offenses listed
8 in the text is possession with intent to distribute, and
9 possession is clearly a lesser-included offense. But the
10 Supreme Court itself, in *Salinas versus United States*, it's 547
11 U.S. 188, specifically held that possession is not a controlled
12 substance offense.

13 So for those reasons, Your Honor, the lesser included
14 argument that the government makes doesn't work.

15 THE COURT: Let me ask this. This is more of a
16 foundational or factual question. So you're not the lawyer in
17 this actual case. Maybe this isn't a question for you. I just
18 want to make sure we're on the same page here. Paragraph 47 --
19 and I might just be missing something, but paragraph 47 seems
20 to refer to both conspiracy and attempt.

21 MR. PATEL: The government is not arguing that
22 conspiracy doesn't qualify --

23 THE COURT: Okay.

24 MR. PATEL: -- and that's because the Fourth Circuit
25 already held in *Norman* that it's not generic, so they didn't

1 need to address that other argument.

2 THE COURT: That's fine. Okay.

3 MR. PATEL: So I think the only issue here is whether
4 the attempt qualifies.

5 THE COURT: Okay, that makes sense.

6 MR. PATEL: Okay. So, Your Honor, so *Dozier* I've
7 already talked to you about why it doesn't control here.

8 The government also cites to other cases, which some of
9 them involve a different commentary in which there were words
10 that were being interpreted. It's not the situation we have
11 here. That was true, I think, in *Allen* and in *Walton*.

12 *Kennedy* doesn't control here because that was a
13 conspiracy case, but it also didn't address the
14 commentary-conflicts-with-the-text issue.

15 *Norman*, the substance of *Norman* doesn't control here
16 because, also in that case, the Court never needed to get to
17 the issue of whether the commentary conflicts with the text
18 because it found that assuming the validity of the commentary
19 conspiracy was not generic.

20 So none of those cases foreclose this Court from making
21 the reasoned decision, and I think the only decision that makes
22 sense, which is that attempted possession with intent to
23 distribute, an inchoate offense, cannot qualify as a controlled
24 substance offense.

25 The last thing I wanted to address is that the government

1 also cites to some cases in which courts, many years ago, with
2 little to no reasoning, found that the commentary does not
3 conflict with the text, but there's very little to no reasoning
4 there. I think the only courts that have really done a
5 thorough reasoning here are *Winstead* and *Havis*. No other case
6 has really delved into this issue.

7 There's also one other district court, *U.S. versus Bond*,
8 in the Southern District of West Virginia. That court also
9 agreed with *Havis* and agreed with *Winstead*. Your Honor, also,
10 the judge in that case, in *U.S. versus Bond* specifically said
11 that *Dozier* is not controlling. So the court there agreed with
12 the argument I'm making now, that it's not a controlling
13 offense.

14 Your Honor, if this Court believes that there's still
15 some ambiguity about whether or not an attempt is included
16 under the text, then this Court should follow *U.S. versus*
17 *Lisbon* --

18 THE COURT: Judge Bredar's case.

19 MR. PATEL: Yes, under the rule of lenity.

20 THE COURT: Got it.

21 MR. PATEL: So if the Court doesn't have any more
22 questions, I'll rest.

23 THE COURT: That was very helpful. I appreciate
24 that.

25 MR. PATEL: Thank you.

1 THE COURT: Ms. Wright or Mr. Morgan. Ms. Wright.

2 MS. WRIGHT: Yes, thank you, Your Honor.

3 THE COURT: Just for timing purposes, that clock up
4 there must be slow. I was looking at that. I have 12:55 here,
5 and so we --

6 MS. WRIGHT: Yes, I believe that's correct, Your
7 Honor, just reading the time --

8 THE COURT: Okay. So I'll hear argument on this
9 issue, and then we'll come back after lunch to deal with the
10 remaining issues.

11 MS. WRIGHT: Okay, sounds good, Your Honor. Thank
12 you, Your Honor.

13 THE COURT: So just on this issue.

14 **ARGUMENT BY MS. WRIGHT FOR THE GOVERNMENT**

15 MS. WRIGHT: Okay, of course. And I will not try to
16 add too much to what I put in the brief since we also did file
17 the response brief, but just focussing primarily on the issues
18 that Mr. Patel has argued and that the Court has inquired
19 about.

20 We do think, as a preliminary matter, that the answer
21 here is simple because this Court is not an appellate court and
22 is obligated to follow *Dozier*. We think, by its terms, the
23 Court really hit the nail on its head that the fact that a
24 particular argument was not raised in *Dozier* does not undermine
25 the unequivocal holding in *Dozier* that attempts qualify under

1 this guideline.

2 As the Court will be well familiar, the Fourth Circuit
3 feels perfectly free to go through other arguments when they
4 support the holding it's making, and they could well have done
5 that in this case too, but they did not. They were aware of
6 the argument, and they held that the commentary -- I mean that
7 attempts qualify under the guideline and its commentary.

8 Mr. Patel referred --

9 THE COURT: But did they address the actual language
10 of the statute or the commentary?

11 MS. WRIGHT: Well, Your Honor, I think they addressed
12 the actual language, but it is correct they did not address the
13 particular argument about the possible discrepancy between the
14 text and the commentary, and I think the key point there is
15 that we do think they are completely consistent.

16 Mr. Patel referred to the cases that the government cites
17 on this point as being older cases, but looking at pages 18 and
18 19 of our original brief, the first three cases we cite on sort
19 of each point are from 2018 and 2017. So I don't think this is
20 any situation at all where this is a dated set of holdings that
21 we're asking the Court to adhere to. Notably, *Dozier* itself is
22 in 2017. So this is a recent case as well.

23 THE COURT: There are two issues. There's one, you
24 know, does the defense get past what I'll refer to as the
25 *Dozier* problem for them? And then if they get past that,

1 then -- I don't know. Obviously, I think you have a trickier
2 argument with just convincing me that the language includes
3 attempt, unless I just follow *Dozier*. That's where I am as I
4 sit here.

5 So what is your response to the defense's point that
6 *Norman* -- that reading *Norman* should instruct me that because
7 *Dozier* didn't address the specific issue that's being raised
8 here, it's not binding on the Court?

9 MS. WRIGHT: Well, Your Honor, I think -- *Norman* was
10 focussing so completely on the element mismatch of conspiracy,
11 and I think even accepting the principles it states about
12 passing observations, we don't have a situation where we are
13 dealing with a passing observation. We are dealing with a
14 situation where there was an explicit holding by *Dozier* that
15 this particular type of crime that we're dealing with qualifies
16 under this guideline and the --

17 THE COURT: But they did that without focussing on
18 the language of the actual guideline or the commentary because
19 those issues weren't raised. So then does that sort of reduce
20 it to a passing observation? Or why doesn't it? I assume
21 you're going to say it does, but why --

22 MS. WRIGHT: Right, because the central question in
23 the case, in *Dozier*, was whether these particular types of
24 crimes qualified, and they said yes. It is not something that
25 can be read. It's a passing observation. We're saying they

1 were addressing whether, without any question or challenge
2 whatsoever to a guideline, a particular set of facts satisfied
3 the guideline or something like that. I think cases that were
4 just applying the guideline, Fourth Circuit holdings would be
5 ones where we would be accepting that those were passing
6 observations, where the guidelines are just being applied when
7 they weren't challenged. But in *Dozier* it was fully
8 challenged.

9 THE COURT: But they never addressed, for example,
10 just what seems like a pretty foundational point of can the
11 language that prohibits the manufacture, import, export,
12 distribution, or dispensing be read to include attempt? They
13 never answered that question, did they?

14 MS. WRIGHT: Right, that's correct, Your Honor. I
15 think that is right. They did not get into that question, and
16 I think that is at least implied in the holding that they
17 accepted it because they didn't see any issue that they were
18 needing to address. But that's why I do want to talk, of
19 course, about that.

20 The federal public defender refers to our -- the
21 government focussing on the word "prohibits," and I think that
22 may be a reference to a different type of case, because in our
23 submissions here, we have not focussed at all on the word
24 "prohibits."

25 The textual argument here hinges on the fact that the

1 plain language of the guideline itself refers to these offenses
2 under federal or state law that prohibits. So in the cases
3 upon which the federal public defender relies generally are
4 doing that same conflation that Mr. Patel does here, that say
5 it was an offense -- read out that entire language of -- that
6 these are offenses under this broad piece of laws, but the
7 guideline does not read that a controlled substance offense
8 means the manufacture, import, export, etc., that was
9 punishable by a term exceeding one year. The guideline --

10 THE COURT: I'm not sure I'm following. Was the
11 offense that he was convicted of an offense that prohibits the
12 manufacture, import, export, distribution, or dispensing if he
13 was convicted of attempt, which is a different offense?

14 MS. WRIGHT: Well, that's why I think it gets into --
15 the answer is yes, but the question is the particular wording
16 of this guideline and the somewhat unique nature of 21 U.S.C.
17 Sections 841 and 846. So the question is whether this was an
18 offense under federal law that prohibits the manufacture and
19 distribution.

20 And it is very important here that this wasn't a
21 conspiracy or something like that under 18 U.S.C. Section 371.
22 Mr. Faison was convicted, and it's reflected on the judgment,
23 of violating Sections 846 and 841 both. So he was explicitly
24 convicted under -- of violating Section 841, which,
25 indisputably, is the federal law that prohibits the manufacture

1 or possession with intent to distribute and everything else in
2 these statutes. Because of that, there have been explicit
3 holdings that we cite in the response memo that attempt is a
4 lesser-included offense of violations of Section 481. And this
5 is sort of a unique --

6 THE COURT: We don't happen to have the J&C here. I
7 am actually curious about that argument that you just made
8 regarding the precise offense.

9 MS. WRIGHT: Your Honor, I did attach the J&C to the
10 response memorandum. So that should be in the packet that you
11 have, that I handed up earlier today.

12 THE COURT: Give me one moment because I think that's
13 an interesting point.

14 I do have it here now. All right, I see it.

15 MS. WRIGHT: Thank you, Your Honor. I think it is
16 fair that -- I mean, simple possession could also -- in some
17 circumstances in some drug statutes also be a lesser-included
18 offense. But here in the federal system, in these statutes
19 that we are dealing with, it is its own offense in 844.

20 So here we do have a unique situation, but I think that
21 unique situation makes very clear that the attempt offense that
22 we're dealing with is an offense under federal laws that
23 prohibit these crimes. And the case law says that specifically
24 as to 841, it is not an assumption at all that we are getting
25 into here. It is actually the specific wording of the statutes

1 that we think is decisive and does show that there's no --
2 yeah, that attempt qualifies under these facts.

3 THE COURT: I guess the question then becomes was he
4 convicted under 846, or was he convicted under 841?

5 MS. WRIGHT: And I believe he was convicted under
6 both, Your Honor. They are both listed in the judgment, and
7 the interplay between 846 and 841 is --

8 THE COURT: But 841 does not include attempt.

9 MS. WRIGHT: Well, I think legally it does, Your
10 Honor, because attempt is a lesser-included offense of 841.

11 THE COURT: Well, I'm not sure that's how federal law
12 works. That's how we tend to think of it because that's how it
13 usually comes up in state law, that it's just a lesser
14 included.

15 Like, if you didn't charge -- I'm not sure I know the
16 answer to this. If you didn't charge 846 in the indictment,
17 could he be convicted of attempt? Or do you have to -- I
18 honestly don't know the answer to this as I sit here. Or do
19 you actually have to charge 846 in order to convict him of
20 attempt or conspiracy?

21 MS. WRIGHT: I believe there were two cases that I
22 cited, and the names I'm blanking on -- and I handed up my copy
23 of the response memorandum -- but I think there are at least
24 two cases that I found just from a quick search showing that
25 841 -- attempt was treated as a lesser-included offense of 841,

1 and I believe in those two cases --

2 THE COURT: In federal law.

3 MS. WRIGHT: In federal law, yes. And I believe in
4 those two cases, the question was specifically raised that the
5 charge had been for violating 841. The jury, I believe -- or
6 the jury came back for guilt for attempt, and that was found to
7 be completely appropriate.

8 So I think based on that landscape and under these unique
9 laws, that this certainly is a case where we are dealing with
10 an offense under these statutes.

11 I also think the language of the guidelines itself --
12 that it refers to this offense under is not at all inconsistent
13 with the commentary, and the fact that it didn't -- the
14 guideline was not worded as controlled substance offense means
15 the manufacture, import, export, distribution, or anything else
16 like that is what leaves it open to the appropriate
17 interpretation by the Sentencing Commission through the
18 commentary.

19 So the commentary is playing exactly the role that the
20 commentary is supposed to play here, where the guideline has
21 particular language that can be open to interpretation, and the
22 commentary provides a consistent interpretation of it. So
23 under *Stinson*, that's perfectly satisfactory.

24 This is a very different situation from *Norman* and the
25 cases that have now taken issue with conspiracy qualifying,

1 because conspiracy, again, it doesn't have the same situation
2 here being a possible lesser-included offense, and the focus of
3 all those cases was on the fact that there was an element
4 mismatch between the generic conspiracy and federal conspiracy.
5 Here, there's not even an argument that there is any issue with
6 the elements of attempt having any kind of mismatch or
7 discrepancy that would cause an actual issue.

8 So *Dozier*, again, was in 2017. This was a very recent
9 finding Fourth Circuit case here. But even on the merits, we
10 think the guideline language we've opened to invite in the
11 commentary and combined, they are clear that attempts qualify,
12 and *Havis* and *Winstead* are outliers, with the bulk of cases,
13 the majority of circuits who have found that attempts qualify
14 including in very recent opinions.

15 The other cases that the federal public defender cites
16 are distinguishable. Judge Bredar's decision, again, was
17 dealing with conspiracy, which is differently situated,
18 definitely, than attempt.

19 And *She11* was dealing with the guideline terms that had
20 been defined differently by case law under different guidelines
21 when the same term is used interchangeably. So we don't think
22 that actually provides guidance here.

23 We think *Norman* supports our present argument both on the
24 merits and that the Court is still bound to follow *Dozier* in
25 this circumstance.

1 THE COURT: Thank you. Mr. Patel, briefly.

2 MR. PATEL: Yes, briefly.

3 **REBUTTAL ARGUMENT BY MR. PATEL FOR THE DEFENSE**

4 THE COURT: One issue I am interested in, as you take
5 your position, is what, in fact -- which offense was Mr. Faison
6 convicted of, under 846 or 841?

7 MR. PATEL: Right, Your Honor. So starting with the
8 language of the text, it says "an offense under federal or
9 state law that prohibits the manufacture." So it's clearly
10 referring to a federal law which is a completed offense, right?
11 So if it's saying an offense under federal law that prohibits
12 the manufacture.

13 So here, we have a federal law, an attempt. It was an
14 attempt. It's not the attempted prohibition. So, yes, there
15 is a federal law --

16 THE COURT: But if he's convicted under 841, that's
17 an offense under federal law that prohibits, whether or not --

18 MR. PATEL: But I think it's referring to -- because
19 there's often statutes with alternative elements, right, and
20 you have to look at what -- so it could be one statute. But
21 then you have to look at the definition. The definition here
22 requires a completed offense under that statute. And when you
23 look at 841, it doesn't say anything about attempt. The
24 only --

25 THE COURT: I agree with that. So then my ultimate

1 question is are you saying -- look, sometimes -- you know,
2 maybe the next time I have this kind of case I'll be more
3 careful. Are you saying, as a technical matter, he was not
4 convicted under 841?

5 MR. PATEL: No, because I think he was --

6 THE COURT: So you are saying he was convicted under
7 841.

8 MR. PATEL: No, I'm agreeing with you. I'm saying he
9 was convicted under 846. 841 determines the sentence, like,
10 the amount -- it's a penalty section that determines that.

11 But, Your Honor, also, what this statute is saying is
12 that I think the offense has to be a completed offense. He
13 wasn't convicted of a completed offense under 841. And when we
14 look at 841, there's only one section that mentions attempt,
15 Your Honor, and that's number 6. It's -- but attempt is not
16 mentioned anywhere else, Your Honor, in the statute. I have it
17 before me. It's talking about completed offenses.

18 THE COURT: So your position -- I'm confident of what
19 your answer is; I just want to make sure. Your position is
20 that he's not convicted -- regardless of what the J&C actually
21 says --

22 MR. PATEL: Yes.

23 THE COURT: -- he's not convicted of a lesser
24 included of 841. He's convicted of a separate offense, that
25 being 846.

1 MR. PATEL: He's convicted of an 846, and one of the
2 elements of 846 is that there has to be a substantial step
3 toward completion of a crime under 841. But what he's
4 convicted of is an attempt, Your Honor. Even if attempt is a
5 lesser included, as I said, I've made the four arguments --

6 THE COURT: So I'm not sure if I agree with that,
7 what you were about to say, because if we say that he's
8 convicted of a lesser included of 841, then he is convicted
9 under 841, and that is an offense, right, that prohibits the
10 manufacture, import, export, blah, blah, blah.

11 MR. PATEL: But what I think this is referring to is
12 that he himself has to be convicted of an offense that
13 prohibits the manufacture, and he wasn't --

14 THE COURT: Right, and if we're saying he was
15 convicted of -- if -- I know you have -- it sounds like you
16 have alternative arguments on this, but if I were to determine
17 he was convicted of a lesser included of 841, he was still
18 convicted under 841.

19 MR. PATEL: Yeah, I don't think that's what the text
20 is saying. I think what the text is saying is that it has to
21 be a completed offense, like the other --

22 THE COURT: Why?

23 MR. PATEL: Because then it would do violence to the
24 words prohibits the -- an offense that requires -- that
25 prohibits the manufacture, import, exportation, or

1 distribution. So that's not referring to an offense that
2 prohibits the attempt. It's saying an offense under federal
3 law that prohibits. It's not saying an offense under federal
4 law that prohibits the attempted manufacture or distribution.
5 So even if it was a lesser included, that's not what this text
6 requires.

7 THE COURT: I see your argument. I see your
8 argument.

9 MR. PATEL: And I think, again, that's consistent
10 with the whole argument I made about possession with intent to
11 distribute too. I think it's specifically requires a federal
12 or state law that prohibits a completed offense, and Mr. Faison
13 was not convicted of an offense that prohibits the manufacture
14 or -- even if we have the lesser-included offense of attempt,
15 that attempt is not an offense that prohibits the manufacture,
16 import, export, distribution.

17 THE COURT: All right.

18 MR. PATEL: Thank you.

19 THE COURT: Thank you.

20 THE DEFENDANT: Your Honor, if I may, I just want to
21 address --

22 THE COURT: Just on this issue.

23 THE DEFENDANT: Yes, just two points real quick.

24 THE COURT: I'll hear you.

25 **REBUTTAL ARGUMENT BY THE DEFENDANT**

1 THE DEFENDANT: Title 21-846, that's actually what I
2 was charged with for the conspiracy and the attempt, and the
3 statute itself reads "any person who attempts or conspires to
4 commit any offense defined in this subchapter shall be
5 subjected to the same penalties." The reason that they add 481
6 to it is to let the person know this is the drug that we're
7 alleging, and this is the penalty for that. So it's actually a
8 separate crime in itself, but they have to put in 841 in order
9 to inform you of the drug that they're saying you had and the
10 amount of time that you were facing for that particular one.

11 One second.

12 841(b)(1)(B), which is the statute that they charged me
13 under, it says "in a case of a violation of this subsection,"
14 and it gives you the amount and the particular drug. So as I
15 said, I was charged with 846; I wasn't charged with 841. They
16 only added the 841 to give you the language to let you know the
17 drug and the amount.

18 THE COURT: All right. You know, Mr. Faison, but for
19 some different choices in life, you could just be sitting there
20 for different reasons. But that's a conversation, perhaps, for
21 later in the day.

22 I'm actually going to ask that you give me until three
23 o'clock because -- assuming that doesn't -- I should probably
24 check to make sure it doesn't interfere with my own calendar.
25 I don't think it does. I'm going to ask that you give me until

1 three o'clock. I want to get something to eat, first of all,
2 and then I do want to look back at some of these issues so that
3 I can resolve them. The other issues I don't think will take
4 very much time, so I'm still confident we'll get done by the
5 end of the day.

6 For Mr. Patel's purposes, I'm not going to take up
7 additional argument when I come back. So you can stick around
8 or just leave it for Mr. Miller to tell you how this turns out.
9 I leave that up to you. You're excused if you want to be
10 excused.

11 But I will ask everyone else to be back at three o'clock,
12 and we'll finish up then.

13 (Recess from 1:15 p.m. to 3:05 p.m.)

14 THE COURT: Good afternoon now. You may be seated.
15 Continuing with sentencing.

16 So we have a number of guideline-related issues to
17 address. We completed argument on one. I'll hear from the
18 government -- let me just sort of go down the list and then
19 I'll give Mr. Faison --

20 MR. PATEL: Your Honor, I just sent an e-mail -- I
21 really apologize -- a couple of minutes ago asking for five
22 more minutes of argument to clarify a point. This is an
23 important issue, and I respectfully request -- and I'm really
24 sorry that I sent -- and, of course, the government can have an
25 opportunity to respond to what I'm about to say.

1 THE COURT: Sure.

2 FURTHER ARGUMENT BY MR. PATEL FOR THE DEFENSE

3 MR. PATEL: I just wanted to say -- thank you so much
4 for your time.

5 So, Your Honor, we're focussing on the word "offense" in
6 the text, and I thought about it a little bit more, and I want
7 to be succinct about why the government's argument doesn't
8 work, because when we're talking about offense, I think what
9 the government is doing is making it -- they're reading it too
10 broadly.

11 *Descamps* and *Mathis* tell us what the word "offense"
12 means, and the word offense means the elements that are
13 necessary for the conviction. So, often, there can be a single
14 statutory scheme, for example, like 841, but there's various
15 offenses because the offense, there's alternative elements
16 which determine alternative crimes.

17 So what I wanted to say here, succinctly, is that whether
18 attempted distribution is 846 or 841, it doesn't matter whether
19 it falls under 841 or 846. It's a different offense because it
20 requires less elements than does what the crime listed in
21 4B1.2, which says there has to be an offense that prohibits the
22 manufacture, import. So the offense that it's talking about,
23 the elements that this text is talking about is a completed
24 offense. So the offense that we have here is an attempted
25 distribution. It is not a completed offense.

1 And that's all I wanted to say, Your Honor.

2 THE COURT: All right. Ms. Wright, if you want to
3 just respond to that point.

4 **FURTHER ARGUMENT BY MS. WRIGHT FOR THE GOVERNMENT**

5 MS. WRIGHT: Yes, Your Honor. Thank you. I think
6 just, also, briefly -- since this wasn't something we focussed
7 on before, I think to the extent that Mr. Patel's argument is
8 accurate, that an offense -- we're looking at what the meaning
9 of the term "offense" is. That renders it ambiguous in the
10 manner that leads precisely to why the guidelines commentary
11 should be able to clarify the meaning consistently with the
12 language in order to specify which things -- which offenses or
13 which crimes it is talking about under the statutes. Again,
14 the key word to the government's argument at this point is not
15 "offense," it is not "prohibits." It is "under," where the
16 guideline refers to offenses under this federal and state law.

17 And the only other point I'd mention in reference to
18 that, Your Honor, is that looking at the judgment, again, of
19 Mr. Faison's in his original case, it does list both -- it
20 lists 846, it lists 841(a)(1), which is not a penalty provision
21 at all, and it lists 841(b), which gets into the amount and
22 penalty provisions. So that court was certainly treating this
23 as an offense under and listed as a conviction under and of
24 841, in addition to 846.

25 And to some extent, the language Mr. Faison quoted on the

1 penalty provision part is that 846 is the penalty provision and
2 merely says how conspiracy and attempts are going to be
3 punished. So we don't think the definition of offense actually
4 changes anything here for purposes of what his conviction was.

5 THE COURT: I appreciate the additional comments on
6 both sides being transparent. Every question that popped into
7 my head as you were going back and forth is a question that
8 I've already resolved in my mind at this point. So that's why
9 I didn't push back on either side, but I do understand the full
10 arguments of both sides.

11 So I do want to hear argument on these other issues, and
12 then we'll resolve them all.

13 I'll say now I am going to write something on all of this
14 just because I think they're -- I count four that I think at
15 least are worth enough thought that I want to put it in
16 writing. Obviously, I am going to sentence Mr. Faison today,
17 but in my rulings, I will probably be brief, not just for
18 time's sake but also because, ultimately, I do plan to issue an
19 opinion on all of these issues.

20 So I'll hear from Ms. Wright as to the remaining
21 guideline-related issues. I'll then turn to Mr. Faison, and
22 we'll see where we are at that point.

23 I list a number of them, including the stolen firearm
24 enhancement, the enhancement for possession in connection with
25 another felony offense. The obstruction enhancement,

1 obviously, we've already dealt with. The issue of whether the
2 attempt qualifies under 4B1.2, so I don't need anything more on
3 that. Then Mr. Faison had requested a couple of 5K departures.
4 So you can address those in any order you wish.

5 MS. WRIGHT: Thank you, Your Honor.

6 THE COURT: As well as anything else I might have
7 missed.

8 MS. WRIGHT: Your Honor, I believe that captures all
9 of the items the government is aware of, and I will reserve, of
10 course, the 3553(a) argument and whatnot until later.

11 THE COURT: Yes, we're not on 3553 yet.

12 **DETERMINATION OF ADVISORY GUIDELINE RANGE**

13 **ARGUMENT BY MS. WRIGHT FOR THE GOVERNMENT**

14 MS. WRIGHT: Okay, perfect. Thank you, Your Honor.

15 With respect to the first question, which is the
16 enhancement for the fact of the firearm being stolen, based on
17 the evidence presented this morning, it is, I think, undisputed
18 that the firearm was stolen. Two agents testified to that
19 effect and gave the date for when it was stolen. And for
20 purposes of the --

21 THE COURT: So let me ask this. This is an issue I
22 have thought about a lot over -- I mentioned to somebody how
23 long I've been on the bench. I couldn't believe it had been
24 that long, five and a half years that I've been doing this now.
25 This issue of the stolen firearm enhancement, it applies. I

1 can't argue -- I don't think there's a real argument that it
2 doesn't apply as written.

3 But in terms of how seriously I should take it, you know
4 i.e., I could apply it because it's correct under the guideline
5 and then immediately vary away from it. As I understand it --
6 and you might have picked up some of this in my questioning.
7 The reason why we have these enhancements, whether something
8 sends something up two levels, down two levels, is because what
9 we're attempting to do, what we're trying to do is make
10 distinctions between different defendants, right? I assume we
11 agree that that's what we're trying to do with these
12 enhancements.

13 MS. WRIGHT: Of course, Your Honor.

14 THE COURT: Like, defendant A is two levels worse
15 than defendant B because he did this thing that drives the
16 enhancement.

17 I guess where I always get stuck with this particular
18 enhancement is that, by definition, we're dealing with felons
19 in possession. Those are the only people that are going to be
20 looking at this enhancement. Felons in possession can never
21 walk into a store and buy a gun. So any felon who is
22 possessing a gun somehow engaged in the illegal marketplace of
23 firearms.

24 And what I struggle with -- and I'm raising this to give
25 you a chance to respond to my thought process on this. What I

1 struggle with is is Mr. Faison actually two levels worse than
2 someone who happened to buy a gun that, unbeknownst to him,
3 came from a straw purchase? Unbeknownst to him, had been
4 manufactured in someone's house? Or, unbeknownst to him, had
5 been stolen previously? Why does Mr. Faison deserve two more
6 levels because the gun that he got out of the illegal
7 marketplace happened to be stolen, without his knowledge,
8 presumably -- there's no evidence to the contrary. He wasn't
9 the one who stole it. Why is he two levels worse than someone
10 who might have gotten the gun from the illegal marketplace, and
11 it turns out that that gun was a straw purchase?

12 I said a lot there. I hope some of it made sense.

13 MS. WRIGHT: It certainly did, Your Honor, and I'll
14 respond to the -- I have a couple of points in response.

15 I think, first, the policy reason and I think why the
16 guideline does adopt, essentially, this strict liability
17 approach to --

18 THE COURT: That's exactly the word is strict
19 liability.

20 MS. WRIGHT: Right, it is, Your Honor, and it is
21 different from, say -- I mean a crime -- in order to be
22 convicted of possessing a stolen firearm, for instance, then
23 one would have to know that it was stolen. But I think the
24 guidelines properly take a broader view in imposing the strict
25 liability, and I think the purpose of that is to send the

1 message that people who have firearms are essentially assuming
2 the risk of their dubious origin if they have not inquired into
3 it and are, therefore, being held accountable for where these
4 firearms came from --

5 THE COURT: Well, I'm assuming, in saying that,
6 you're not suggesting that Mr. Faison should have asked whoever
7 he got the gun from is this one stolen or did this one come
8 from a straw purchase.

9 MS. WRIGHT: I don't think it would have been
10 inappropriate for him to ask that, but I do actually disagree
11 with the Court's --

12 THE COURT: Would it have been realistic?

13 MS. WRIGHT: I think in Mr. Faison's situation, yes,
14 it is, understandably and correctly, difficult to get firearms,
15 and I think there is varying assumptions sometimes that, oh,
16 yes, probably this one doesn't have the history that one would
17 dream of, but that's also part of why law enforcement wants to
18 recover those firearms and why it is a problem for law
19 enforcement when all these firearms are out there that can't be
20 tracked.

21 But I do disagree with the premise, I guess, that all
22 people who are accountable for being a felon in possession have
23 something dubious in terms of how they got control of the
24 firearms. I don't think that actually is typically -- I mean,
25 it may be typically true on the way these cases evolve, but I

1 think there are a variety of different ways when this can come
2 to pass. Sometimes there are firearms that legitimately belong
3 to someone else and are owned, legally, perhaps by the other
4 person, and the person who is accountable for being a felon in
5 possession of them ends up in the house, too close, in the car,
6 other things like that that can bring him into proximity to it.

7 THE COURT: Sure, but that sounds like something for
8 which maybe a downward departure might be appropriate, right?
9 Like, there are certainly -- if someone is a felon in
10 possession of a gun and goes out and just buys a gun from the
11 guy on the street who sells him a gun illegally, we are saying
12 that if the gun gets traced and it happens to be stolen, that's
13 a two-level increase over someone who the gun gets traced and
14 it happened to have come from another means, without any
15 thought to whether or not that actually is worse behavior on
16 the part of the defendant. That's what bothers me about it.

17 MS. WRIGHT: Understood, Your Honor, and it is,
18 again, I guess, a question of their -- if someone is in that
19 position, then they are assuming the risk. It sort of is
20 analogous to someone taking the victim as they find them. Some
21 people in -- I mean, violent crime cases and assaults and
22 whatnot, if they happen to have a particularly vulnerable
23 victim, then, through no actual difference in their conduct,
24 could end up accountable for the additional harm that they
25 pose.

1 I think, here, it's a similar analysis that if you're in
2 this area, you are assuming the risk. If you aren't checking
3 the pedigree of the guns, basically, that your gun will have a
4 history or these characteristics, just like a victim might,
5 that make it more aggravating and more dangerous to society.
6 And it does pose more of a risk to society than a gun that is
7 otherwise perfectly well traced but happens to end up near
8 where a felon is. I think that's a choice that the law has
9 made that they're -- even if it's not --

10 THE COURT: Well, the guidelines have made that
11 choice.

12 MS. WRIGHT: Well, yes, the guidelines, but that the
13 law makes in other areas, that you sort of take the victim as
14 you find them, so you take the gun.

15 And I will note here there was -- there was a shotgun in
16 a closet in that residence that belonged to Mr. Newman, Sr.,
17 had inherited it. So there are, again, sort of legitimate ways
18 that people might have these guns that they could theoretically
19 be accountable for possessing, but that kind of gun is not the
20 concern of law enforcement. That wasn't charged. That wasn't
21 an issue here at all. It was secured. It wasn't being used in
22 the way that these guns were. So it's definitely a different
23 concern, and there are these -- what I believe really are sort
24 of innocent guns that can end up in the hands of felons who end
25 up possessing them, and that's a problem, but it is a different

1 problem here, where the facts really highlight how -- the law
2 and the regulation of guns is trying to prevent, which is
3 people who are not supposed to have guns ending up with guns
4 that law enforcement can't trace. So one of them was stolen;
5 one of them was homemade. So there is no way to be aware of
6 what's happening with the guns, and I do think it's a fair
7 choice by the guidelines, as in other areas of the law, to hold
8 the defendants, who are engaged in this obviously illegal
9 activity, accountable for what the actual facts are. And that
10 can be true, too, if someone knows they possess a controlled
11 substance, it turns out to be something different or they don't
12 know the weight, they can be accountable for that too.

13 So that is why we do support the enhancement here,
14 because it is more aggravated, more dangerous, and more of
15 concern to the government than the average case, even a felon
16 in possession.

17 THE COURT: All right. I appreciate your response.

18 MS. WRIGHT: The second point, I believe, is the
19 four-level enhancement for possessing the firearm or firearms
20 in connection with another felony offense --

21 THE COURT: I guess you have two arguments on this
22 one. I think your stronger argument is the one that I -- I
23 can't remember when I read it, but your argument that he had
24 the firearm, and he was going out to commit a felony, right,
25 because intent is captured by that provision. So, yeah, I

1 think you have a strong argument there.

2 I am wondering -- not that you -- you don't need to win
3 on both, but in terms of the ammunition in the bedroom, as I
4 understand it, in order -- and I'm putting my thoughts out
5 there so you can tell me if I'm wrong here.

6 MS. WRIGHT: Yes, thank you, Your Honor.

7 THE COURT: As I understand it, the ammunition in the
8 bedroom he's acquitted of by the jury. That doesn't mean I
9 don't still consider it. The additional felony would be the
10 drugs that weren't charged. I know I can still consider it.
11 And those drugs seem to have come, likely, from Mr. Newman in
12 some way, who, just based on the difference in quantities,
13 seemed to have been the one with more of it.

14 I just wonder if that is really a forceful argument for
15 saying he should receive a four-level enhancement for that
16 reason. Putting aside whether or not he was going to go hunt
17 these guys with that firearm. I actually do think you have a
18 strong argument there. But on the first one, I guess I'm
19 trying to understand the government's argument.

20 MS. WRIGHT: Of course, Your Honor. Thank you very
21 much for outlining that.

22 And I do think -- yes, turning specifically to possessing
23 it in connection with the drugs, I think there are several
24 factors here that make the enhancement appropriate on that
25 basis as well.

1 First, I'd note that while the -- yes, the vast quantity
2 of these drugs were in Larry Newman, Jr's room, so we aren't --
3 I mean, Mr. Faison, as you see, was not charged ultimately with
4 the possession with intent to distribute, but I think the facts
5 that we have here, certainly for the standard that we're
6 looking at for sentencing, make it very appropriate to apply
7 the enhancement that these guns were in connection with, which
8 includes that they could have had a role as to the drugs.

9 Notably, the tools for the --

10 THE COURT: But the felony offense we're referring
11 to, just to be clear, that that would be in furtherance of or
12 supporting or whatever, what have you, would be PWID PCP. Or
13 is there something else that I'm missing?

14 MS. WRIGHT: Well, I think from the -- I guess there
15 are two. It's PWID, the PCP, the cocaine, and the crack
16 cocaine.

17 THE COURT: Well, the cocaine is just in residue
18 amounts. You certainly would never charge that, but I guess
19 your point is it's indicative that there's ongoing drug
20 distribution he's involved in.

21 MS. WRIGHT: Yes, Your Honor, and on the cocaine, I
22 can refer back to the specific lab report, but the amount of
23 cocaine in Larry Newman, Jr.'s, room was approximately 40 grams
24 in one bag.

25 THE COURT: In Larry Newman, Jr's, room.

1 MS. WRIGHT: Yes. And the amount of crack cocaine,
2 so the cocaine base in Larry Newman, Jr.'s, room, was, I guess,
3 a bit more than 28 grams in 547 individual bitty, bitty
4 baggies, which is certainly for distribution. And so the --

5 THE COURT: Sounds like a great charge against
6 Mr. Newman, Jr.

7 MS. WRIGHT: Thank you, Your Honor. In Mr. Faison's
8 room though -- and I'm sorry. And also in Larry Newman, Jr.'s,
9 room, there were approximately 100 of these individual packets
10 of PCP.

11 Now, Mr. Faison had around approximately less than 10 --
12 I think that was the testimony -- of these matching little
13 packets of PCP.

14 THE COURT: I think there were six.

15 MS. WRIGHT: Six? Thank you, Your Honor. But there
16 were also all of the tools in that backpack for the manufacture
17 of crack cocaine from cocaine base, and there was residue both
18 of cocaine base and cocaine on these items in the backpack,
19 which included the frother -- or the whisk, these different
20 items. There also was the additional Pyrex, sort of matching
21 glass container in the drawer that also had the pill bottle
22 with Mr. Faison's information on it that was talked about even
23 more at trial.

24 So all of this evidence is very suggestive of a joint
25 enterprise, and certainly by the preponderance of the evidence

1 standard here, where the manufacturing tools are in
2 Mr. Faison's room, the actual drugs packaged and ready for
3 manufacture are in Mr. Newman, Jr.'s, room, and the
4 conversation that we played in the clip I think also is part of
5 what we're relying on here, because when Mr. Faison calls home,
6 it's the first call after he's been arrested. Larry Newman,
7 Jr., gets on the phone. They're asking -- Mr. Faison asks if
8 they came in the house, and Mr. Newman, Jr., says affirmatively
9 and "they took everything." And he also says later in the
10 conversation -- and there's sort of a double negative right at
11 the end, so it's a little hard to understand exactly what he's
12 saying, but by the government's reading, it amounts to that
13 there was nothing left to protect and that the guns have also
14 been taken, so there may be less to protect things with.

15 But those are not statements by people who aren't
16 complicit and at least knowing, and Mr. Faison apparently -- I
17 mean probably doing -- the evidence shows sort of possibly,
18 quite likely doing the manufacturing, at least sort of aiding
19 and abetting this possession with intent to distribute of these
20 drugs that are in the basement, with a bit in Faison's room and
21 then more in Mr. Newman's.

22 THE COURT: So to summarize your argument, what's
23 found in Faison's room is sufficient to connect him to the drug
24 operation clearly coming out of Mr. Newman, Jr.'s, room.

25 MS. WRIGHT: Right, yes. I think that's exactly

1 right. With the manufacturing and then -- and that relates --
2 so the felony for him could be manufacturing the controlled
3 substances, since there's evidence of that from his room
4 directly, but that's also very closely tied to the possession
5 with intent to distribute those controlled substances,
6 including these baggies of what was manufactured to the tune of
7 547.

8 It is also appropriate to take into consideration for
9 this guideline Mr. Faison's criminal history, that he has
10 previous convictions, a variety of previous controlled
11 substance arrests, but also convictions, including the attempt
12 to possess with intent to distribute 500 grams or more of
13 cocaine that came out of the Eastern District of New York, and
14 that that also can inform the Court as to the likely lay of the
15 land here in terms of all those drugs.

16 People certainly don't keep these things in another
17 person's room unless that person is complicit with the criminal
18 activity. Mr. Faison's questions pertained to whether there
19 were fingerprints, other things relating to the backpack. But
20 even without those things, the fact that it was -- everyone was
21 perfectly comfortable having this in his room we think shows,
22 as with the ammunition, that this was plainly his stuff. It's
23 his room. According to even his father at the time, there's no
24 one else living there except the parents and the two sons in
25 their respective rooms. We think it's his.

1 And I think the fact that he had the ammunition in the
2 room, and the guns on his person that corresponded exactly to
3 that ammunition, also supports the finding that the guns had
4 some relationship to the drugs where the manufacturing items
5 were there in that room.

6 Mr. Newman, Jr., had his own gun and, notably, his
7 firearm, whether they're both .45 caliber for one firearm, it
8 had its own single bullet, but the number of bullets that were
9 missing from the box of ammunition in Mr. Faison's room were
10 eight, and that's exactly how many were in the firearm that was
11 in his waistband when he was pulled over. So he had control
12 over that. The fact that Larry Newman, Jr., may also have been
13 choosing to protect the stash there doesn't affect what the
14 evidence does show as to Mr. Faison.

15 And that's why we think that for the felon -- yes,
16 possession with intent to distribute, which we think is at
17 least aiding and abetting and complicit with, based on their
18 conversation immediately post arrest. So that's what they were
19 choosing to talk about, was that everything is gone. I think
20 the inference is certainly that refers to the drugs, the main
21 things that were otherwise seized from the house.

22 Also, I should mention Mr. Faison had the digital scale
23 in his room, which is another key tool for the manufacture and
24 then the distribution of these controlled substances.

25 So we do think -- I mean, absolutely -- and I can talk

1 more about the first grounds for applying the enhancement, but
2 it sounds like the Court doesn't necessarily need to hear more
3 about that in terms of the first degree assault, which we think
4 is plainly established by Mr. Faison's jail calls and
5 otherwise. But we think, also, the drug crimes PWID and
6 manufacturing of the controlled substances, with the sentencing
7 standard, is enough to justify the enhancement.

8 THE COURT: Understood.

9 MS. WRIGHT: With respect to the obstruction of
10 justice, there were the two particular examples, and we think
11 there are many more of these, that showcase Mr. Faison's lying
12 at trial and attempting to mislead the Court and the jury,
13 which we think is very plain on the record here.

14 THE COURT: Let me ask, because this is another one
15 of those where I have some philosophical issues, so you have to
16 bear with those thoughts.

17 Is it the government's position that any time an
18 individual goes to trial and chooses to take the stand, and the
19 jury rejects his or her testimony by virtue of their verdict of
20 guilty, that the two-level enhancement for obstruction of
21 justice should be applied? Is that the government's position?

22 MS. WRIGHT: No, Your Honor, it is not in the
23 position of this counsel, and that's what I can --

24 THE COURT: You are the United States as you stand
25 there now.

1 MS. WRIGHT: Yes, I am speaking for the United
2 States. So, no, that is not the position. I think certainly
3 here, for example, if Mr. Faison had --

4 THE COURT: But what's the -- I'm sorry, you were
5 about to answer the question I asked. Go ahead.

6 MS. WRIGHT: Yes, I was trying to answer the
7 question. But if Mr. Faison had testified to what the
8 government believes are the facts --

9 THE COURT: If he got on the stand and confessed, you
10 wouldn't --

11 MS. WRIGHT: Well, no, not at all, Your Honor. I
12 think part of the issue that we have with the story that we
13 believe Mr. Faison patently made up for trial is that it shows
14 that he believes he was not justified, because he is making up
15 additional facts, like the fact that he was going to the police
16 and this supposed claim that the counterparty to the road-rage
17 incident had this weapon, that if he were actually justified --
18 I mean, they're sort of fabricated to meet the defense,
19 unfortunately.

20 Whereas, if he had gotten up and said the story of this
21 guy came -- did follow us to the house, independently of
22 whether he was led there, the guy was definitely a bad actor in
23 following to the house, and he said "I know where you live at;
24 I'll be back," and then Mr. Faison was going after him with the
25 guns, maybe just if he hadn't said he was trying to kill him,

1 but perhaps if the truth had been that he was just going after
2 to try to really scare him off, then that kind of testimony --

3 THE COURT: That would be a confession. So what you
4 just said -- that's my exact point I just made, right? What
5 you just said would be enough to convict him.

6 MS. WRIGHT: Well, if it didn't meet the elements of
7 the justification defense. The problem for Mr. Faison is that
8 the true facts did not meet those elements, and so --

9 THE COURT: So the jury determined. So the jury
10 determined, and so he stands convicted of the charge. But
11 you're not actually disagreeing with my original point, which
12 is that because he took the stand in his defense and the jury
13 didn't buy it, he gets an extra two levels.

14 MS. WRIGHT: Not at all, Your Honor. If he had
15 gotten on the stand and he had given the true facts, the jury
16 could have rejected it --

17 THE COURT: What you see as the true facts.

18 MS. WRIGHT: Yes, what we understand as the true
19 facts based on the statements he made in the jail calls, when
20 we don't believe he had any incentive to lie, if he had just
21 told that story, yes, he would have been convicted because it
22 would not meet the elements, but he would not get an
23 obstruction enhancement.

24 The point that I'm trying to make is that the reason for
25 the obstruction enhancement is because what he said at trial

1 directly contradicts what he said in the jail call recordings
2 and sort of everything else circumstantial as to how he was
3 behaving. Someone who is on their way to turn in guns to the
4 police would in no circumstance, the government submits,
5 conceal those guns in his clothing, especially if he had just
6 happened to find these guns, miraculously, in a shockingly
7 unlocked trailer belonging to his brother in the circumstances
8 he described. He would not put one vertically in his shirt and
9 the other one in his waistband, without even knowing if they
10 were loaded, and then jump in that car. I think that is
11 absurd. The fact that Mr. Faison, again, in the government's
12 view, fabricated that kind of argument is why we think the
13 obstruction enhancement is appropriate.

14 If he had told the truth, yes, he might have been
15 convicted, but there would be --

16 THE COURT: If he had confessed. If he had
17 confessed, you wouldn't seek the enhancement.

18 MS. WRIGHT: Right. And again, Your Honor, that's
19 not really what we're trying to say. We're trying to say that
20 because there are all these contradictions in the story that he
21 told, and also because -- we believe, also, that his father was
22 enlisted to support this story and to claim that Mr. Faison had
23 said that they were going to go to the police, when that is
24 contradicted by all the facts of what they said once they were
25 stopped, and --

1 THE COURT: To be clear, the position you're taking
2 is the position the office has been taking for generations. So
3 this isn't, like, about this case. It's a philosophical issue
4 that I've had for a long time. And so it just is what it is.

5 MS. WRIGHT: And I certainly understand the issue,
6 Your Honor, and I'm sorry I'm not -- I don't think I'm managing
7 to articulate my response exactly well --

8 THE COURT: You're articulating it fine.

9 MS. WRIGHT: There have been previous cases where
10 defendants have testified, in my personal experience, where I
11 don't -- I would have to look back since some of them are
12 multiple years ago, but it certainly is not an automatic rule
13 that then they are charged with obstruction of justice. I
14 think the unfortunate fact may be often when this happens, the
15 government does end up of the view, with the additional
16 information that we have, that the defendant is lying. But if
17 that weren't true, then there certainly would be no basis for
18 the obstruction enhancement.

19 That's also true and sort of analogous if someone goes to
20 trial to preserve a defense. So, say, if Mr. Faison had done
21 that to try to preserve the interstate commerce legal
22 disagreement appeal or something to that effect, then there
23 would be situations where you could still receive the point for
24 acceptance of responsibility. The guidelines do carve out the
25 types of behavior that do or don't warrant the enhancement.

1 And unfortunately, for better or worse in this case, the
2 government believes that Mr. Faison demonstrably lied at trial,
3 because what he says contradicts not only what he said
4 previously, with no incentive to lie, and the actual facts of
5 his conduct, and that's the basis on which we think the
6 obstruction enhancement has to apply.

7 THE COURT: All right, understood.

8 MS. WRIGHT: And I was starting to add briefly on
9 that, that, again, from the government's point of view,
10 Mr. Faison's father also adopted this story and was actively
11 misleading, in that his demeanor while answering the questions
12 between Mr. Faison and the government, where he talked a mile a
13 minute when Mr. Faison was having him tell the story, including
14 the points that were supportive of him, and then said, when the
15 government was cross-examining him, that he couldn't remember
16 what happened 10 minutes ago, and he was very resistant to
17 saying anything, shows that he was sort of enlisted in support
18 of the story that Mr. Faison was waiting for trial.

19 And we think that also, separately -- even if one were
20 choosing not to hold it against, specifically, the defendant,
21 their testimony, we think that other testimony, where
22 Mr. Newman, Sr., what he said was opposed to his original
23 interview and all the grand jury testimony, that that's a
24 separate additional step and could be a separate basis for
25 application of the enhancement if the Court is uncomfortable

1 with it as to Mr. Faison himself.

2 So we think, certainly, it applies as to Mr. Faison, but
3 also the fact that he was enlisting additional witness
4 testimony in support of --

5 THE COURT: I apologize. I might have missed this.
6 Other than another witness testifying consistently with him, is
7 there evidence that -- is there a jail call? Is there
8 something -- and if you just said it and I missed it, I
9 apologize -- something that indicates he made some effort to
10 get another witness to testify falsely? As opposed to just the
11 fact that another witness testified and wasn't believed by the
12 jury.

13 MS. WRIGHT: We are relying on the fact, Your
14 Honor -- with the jail calls, I don't have them prepared to
15 play, so if I may proffer.

16 The government has listened to Mr. Faison's jail calls
17 during the course of the trial. There were repeated references
18 where he was referring to his father sticking to the story and
19 not wanting him to talk about other things and referring to a
20 list of questions he had given him and that he didn't want him
21 to talk about other things, but none of it was sort of clear
22 enough in context that we thought that we would sort of be in
23 the position of charging obstruction or anything else like
24 that. So there certainly were highly suspicious comments in
25 the jail calls.

1 Mr. Faison was also communicating with his family via
2 three-way calls and other ways that we wouldn't have full
3 access to. We don't know if he was using other people's --
4 another person's account, which I would expect -- since he knew
5 well that the jail calls were being used against him, I would
6 think that was perfectly possible too.

7 But in the recordings that we have listened to from his
8 account, he was definitely saying things that are suspicious
9 but not some things that, yeah, we're prepared to submit as,
10 like, this shows that this was fabricated from that
11 perspective.

12 We're relying on the fact that the story --
13 Mr. Newman, Sr.'s story being completely new for trial, versus
14 what he had said in the two previous conversations, including
15 under oath before the grand jury. And then when he was being
16 cross-examined, he basically said he hadn't understood anything
17 about the oath and he couldn't remember anything, which
18 undermined all of what he had just testified to.

19 Excuse me. Let me get some water --

20 THE COURT: Take your time, please.

21 MS. WRIGHT: Thank you, Your Honor.

22 THE COURT: Sure.

23 MS. WRIGHT: Turning to the victim conduct
24 adjustment, so the downward departure -- unless there's
25 anything else --

1 THE COURT: Nope.

2 MS. WRIGHT: Okay. So with respect to 5K2.10, for
3 the victim conduct, I think we did reply to this in our
4 response memorandum. I think it does not apply here, partly
5 because, based on the statement that Mr. Faison made that he
6 was going home to get to them guns, we do know that Mr. Faison
7 knew the guns were there and had them before he went back to
8 his house and before anything with respect to the road-rage
9 incident happened. So in terms of his accountability for
10 having these firearms, he was fully accountable for it
11 independently of any victim conduct or anything to do with the
12 road-rage incident.

13 We also would say, again, that we take the fact that
14 Mr. Faison, in the government's view, embellished the story,
15 with the idea of going to the police and with this supposed
16 weapon that the victim in the road-rage incident had, shows
17 that he was not justified, that even he thinks that he did not
18 have the reason to do what he did, in retrospect, so that he
19 had to fabricate these additional facts to make it appear
20 justified. We think that also undermines any applicability of
21 this adjustment.

22 We do refer the Court to -- and I hope the Court had the
23 opportunity to view the statements by the victim and the
24 other -- and the lady in the vehicle right after the incident
25 that we submitted as exhibit C to the sentencing memorandum,

1 because I think those are very telling, and the Court was able
2 to, I mean, read their body language. I'd note that exhibits A
3 and B to the sentencing memo, where they gave those statements,
4 were completely consistent with each other in what happened.
5 There was no suggestion, as the government reads it, that there
6 was an attempt to get their stories straight or exaggerate
7 anything. They were both clear that they didn't -- or at least
8 the gentleman who was the one who was more involved in that
9 didn't see the gun. He was not -- it's not like they were
10 throwing out any idle accusations. They were describing what
11 happened.

12 And, again, certainly what they did, in the gentleman
13 following Mr. Faison to the house, no one would want that, but
14 the fact that Mr. Faison, again, is a bigger gentleman, the
15 factors listed in the guideline don't count in his favor, and
16 he could at any point have done a number of things, the
17 government thinks, to defuse the situation, which he refused to
18 do. He could have gone directly to the police station, since
19 he knew they were going followed. He could have haled a
20 passerby.

21 At least Mr. Newman, Sr., had his phone, and if there had
22 been a threat that he perceived, they could have used the
23 phone. There was -- Mr. Faison's mother testified that there
24 was a security system at the house. So they could have taken
25 other steps once they got back to the house as well.

1 So we think all of those things render that downward
2 departure inapplicable.

3 And the same arguments basically go for the coercion or
4 duress departure similarly.

5 Again, we think that if -- the fact that Mr. Faison is
6 embellishing the story, and we think that is established by the
7 contradictions between what he said when he didn't have an
8 incentive to lie and what he said at his trial, shows that he
9 did not feel threatened in the manner that he was trying to
10 lead the Court and the jury to believe.

11 Even if he had in that situation, that would not provide
12 him any defense for the fact that he had the guns. The
13 ammunition in his room, we submit, is established by the
14 evidence, and he had the guns -- he was aware of the guns
15 before he went back, before anything had happened with the
16 road-rage incident at all. So neither of these two adjustments
17 actually insulates him from accountability for the guns that he
18 knew were there and before anything at all happened, because he
19 had armed himself with them.

20 THE COURT: All right. Thank you.

21 Mr. Faison, you can address any or all of the issues that
22 are on the table, which includes the stolen firearm
23 enhancement, the enhancement for possession of the firearm or
24 ammunition in connection with another felony offense, the
25 two-level obstruction enhancement, and the 5K departures that

1 you have requested. So I'll hear from you on as many of those
2 as you wish to address. I, obviously, did review what you
3 submitted in writing.

4 **ARGUMENT BY THE DEFENDANT**

5 THE DEFENDANT: Okay, I'll start with the two-level
6 enhancement for the stolen, since that's where the government
7 started at. I'm taking a look at 2K -- what did I do with
8 that?

9 THE COURT: 2K2.1(b)(4).

10 THE DEFENDANT: So if you look under note 8, it tells
11 you how to apply Section (b)(4), and it goes into several other
12 sections of 922 and 924, but they're specific offenses dealing
13 with the firearm being charged that's stolen, as in actually
14 being charged in the count. When you read them, it tells you
15 that the offense level for these two -- or these four, rather,
16 would start at 12.

17 So, basically, the only reason that I would receive a
18 higher number is because I'm a felon at the time. Those four
19 actually don't require the felon holding. And I kind of agree
20 with the Court that this two-level enhancement is an increase
21 for a firearm that there's no way I can actually know that it's
22 stolen. I mean, being a felon, I wouldn't get it through any
23 means other than outside of purchasing through the store. So
24 even if I bought it from an individual and lied to them about
25 my status, I still can't know whether or not the firearm I'm

1 purchasing is stolen.

2 That being a factor, I would ask the Court to consider
3 that you have a section that deals with the actual charge of a
4 stolen firearm, which is less. In those four statutes, they
5 actually require that it be proven, and now you have a
6 situation where I'm being added two points, and they don't even
7 have to prove that I had knowledge of the stolen firearm.

8 As to the in connection with --

9 THE COURT: Connection with another felony offense.
10 And I think -- as I indicated to the government, I think the
11 tougher of the two arguments for you to overcome, so you may
12 want to address this first, the government makes the point that
13 if I accept what you said in the jail calls, that you were
14 going after these individuals with the intent to do them
15 serious bodily harm, and so that would be sufficient to show
16 that you possessed that firearm with the intent to commit at
17 least first degree assault. So I'd be most interested in
18 hearing your argument as it relates to that.

19 THE DEFENDANT: Well, I believe the actual calls
20 they're dealing with, it doesn't specifically say that I was
21 going after them. I think the statement I made was "God saved
22 him and he saved me because I was going to kill him." And in
23 reference to that it was dealing with what was taking place
24 right at that moment, as in if you come at me trying to harm
25 me, I'm going to defend myself because I don't know what you're

1 trying to do to me.

2 THE COURT: But don't the calls -- if you listen to
3 the calls, don't -- and we're talking about a preponderance
4 standard here -- are you saying that one does not come away
5 with a pretty clear belief that you were going after them with
6 those firearms? You're saying that's not what I should take
7 from those calls?

8 THE DEFENDANT: Well, I would rather you re-listen to
9 them because there's a difference in, oh, yeah, I was going to
10 get him and, oh, I'm going to kill him if he tries to harm me.
11 And the problem with semantics is I may communicate with you
12 one way; I may communicate with this individual a different
13 way.

14 In addressing that, there's, like, the conversation
15 between me and my brother. My brother is asking me the
16 question why would you do that. I know what he's asking, but
17 an outside person wouldn't understand that he's saying if this
18 man didn't have a gun in his hand, why would you pick up one,
19 and that's why I'm saying to him what would you do; you don't
20 know what's going on.

21 And then you have the portion dealing with me saying I
22 didn't see anything in his hand. It wasn't in reference to not
23 seeing the metal. It was in reference to, okay, I don't see a
24 gun, but that doesn't mean he doesn't have one. I have to be
25 ready for that type of situation.

1 And, once again, in semantics, my brother understands
2 what I'm saying to him; I understand what he's saying to me.
3 But if I speak to my mother, my mother isn't going to
4 understand that. She wouldn't know that, in reference to
5 having that conversation, I'm talking about he already saying
6 why would you pick up a gun if it ain't necessary. I'm saying
7 to myself, regardless if I see a gun or not, to me it's
8 necessary. I don't know what you're going to do. I have to
9 think about the circumstances. We're in a --

10 THE COURT: Here's a quote from you, sir. "I was
11 getting ready to go kill him, and I got caught with the guns."
12 How do I not find that there's a preponderance of the evidence
13 that you had those firearms, and you were on the way to go do
14 those individuals harm?

15 THE DEFENDANT: Well, there's two ways to look at
16 that. Once again, it's the individuals that I'm talking with,
17 and when I'm talking with them, I'm talking with them inside my
18 head, as in this is the frustration. Like, you saying that
19 you're going to do something to me, you're going to do
20 something to my family, I'm going to come kill you for that;
21 you're not going to come back here. But it's not my intent.
22 It's taken as I intended to do that, but it's not my intent.

23 The trial testimony and Mr. White's affidavit that he
24 wrote for Ms. Eidell all shows clearly that he says the man
25 didn't threaten me. As a matter of fact, he didn't say

1 anything to me. He was just standing there. So if I intended
2 to go do something to him, I could have did it then.

3 Now, you have one report that says, oh, they ran into the
4 house. Now, it's conflicting, which I understand, and because
5 we didn't have him to clarify exactly what he said and what was
6 true, we have to go on which one actually I'm willing to
7 believe. And as I said, when I stepped out of the trailer, I
8 see him, he's getting out his car, he's standing at his door,
9 he has the bar in his hand. So all I did was step back in and
10 look for something to protect myself. When I found those
11 firearms, the question of whether or not I knew my brother had
12 firearms or that I knew there were firearms in the house does
13 not make a difference. The crime is felon in possession.
14 These are factors that when the Court consider it, they have to
15 consider what actually took place. There was no following of
16 him.

17 My father testified he didn't get in his vehicle to try
18 to chase anyone. He came out the house. He was going to work.
19 I hopped in the vehicle. He didn't even know I had the guns.
20 I didn't say come on, dad, let's go do this to this person. My
21 father is 70 years old, just had two knee surgeries. All it
22 was was, dad, we need to go to the police department. My
23 father doesn't need to know any specifics because I know how my
24 father is. It would have been an issue because the first thing
25 he would have said was I done told this boy.

1 And like I said, my frustration, the first calls are
2 coming from anger, frustration, loss of common sense. As I
3 told you in my letter, my mother told me don't let these young
4 guys trick you into anything.

5 And it was a perfect example of how me feeling a certain
6 way made me speak a certain way, but it wasn't an intent. It
7 was just what I'm thinking, what I'm going through in my head.
8 And a lot of people that I'm speaking to, you'll see that I
9 might have had that conversation one time. So you're hearing
10 partials, and you're not hearing when they ask me questions.
11 The whole 15-minute call, their questions, well, why did you;
12 well, why didn't you, and I'm -- so I'm frustrated about being
13 in prison because, to me, even though I accept responsibility
14 for what I did, I don't feel that I should be punished in this
15 type of way just for me trying to say, please, I don't want to
16 hurt you, I don't want you to hurt me, but I'm going to stop
17 you from doing anything to me and my family. And that's what
18 was going on in these conversations, is what's going on in my
19 head.

20 So in addressing the statements, all I can say is this is
21 what they came from. There was no intent behind it, and
22 there's nothing to show, other than me making the statement,
23 that there was intent. Mr. White's affidavit showed I never
24 did anything threatening. I never tried to approach him. He
25 even says that I just stood there and looked at him as he went

1 through whatever he went through.

2 So the enhancement itself, in connection with -- I mean,
3 there's three or four other things that they go through. The
4 possession of the drugs in the room. I think there was another
5 one that I don't quite remember. But the commentary dealing
6 with "in connection with" actually has it to where the offense
7 of conviction has to have some connection with the part that
8 the enhancement coming from, and I didn't -- the way I printed
9 this out, I didn't get the actual case --

10 THE COURT: But even if I accept that as a guiding
11 legal principle, in this case, the firearm you have in your
12 hand, isn't it connected to the ammunition in your room?
13 Understanding you were acquitted of that conduct, but I'm sure
14 you understand I can still consider it. Isn't the firearm
15 connected to the ammunition?

16 THE DEFENDANT: Well, the connection is only in the
17 caliber of ammunition. Because the firearms were found outside
18 the home, and they were found in possession, and they were
19 found as we were driving, I don't see how there can be a direct
20 connection with the drugs found in the home. It's more or less
21 that you're taking the ammunition and saying, okay, the
22 ammunition fits the firearm, so it's in connection with the
23 drugs. But the offense of conviction is possession of
24 firearms, and that means if you're trying to give the
25 enhancement, then the enhancement needs to connect to the

1 offense of conviction, not something from another part of the
2 offense. The actual offense is possession, and there's no
3 connection to those drugs in the home except in the
4 government's perceived connection, oh, he had to have these
5 guns to protect the drugs.

6 Once again, they're asking me to infer that my brother
7 did or did not, whatever the case may be. Once again, I didn't
8 have nothing to do with his case. His case is his situation.
9 I've been asking that that not be implied in mine, but it seems
10 to keep falling that way.

11 In order for me to put forth an argument against all of
12 this, it basically -- I have to tow the line on, well, Your
13 Honor, as you can see, this is what's going on. Does it have
14 anything to do with me? No. But the implication is it's in my
15 room, you must know about it. But then I would have to say,
16 well, Your Honor, I'm not rarely there. It's my room. I have
17 to be in principle of being on supervised release, but most of
18 my time is spent at my baby mother's house. The transference
19 of those things, if my brother goes in here and does things and
20 get absent minded, I don't be in the room enough to say, oh,
21 where the heck this come from. When you see the drawer, the
22 drawer just has miscellaneous stuff. He put something in
23 there.

24 Once again, I don't want to focus on that because, like I
25 say, he has a situation, and I don't want it to seem as if I'm

1 saying, oh, yeah, I know about this; he did this; this was the
2 situation. The enhancement itself has to deal with the
3 possession outside the home because it says the offense of
4 conviction.

5 THE COURT: All right, I understand your argument on
6 that.

7 5K, your argument.

8 THE DEFENDANT: Obstruction of justice.

9 THE COURT: I'm not going to apply the obstruction of
10 justice enhancement, so we don't have to spend more time on
11 that.

12 5K2.10

13 THE DEFENDANT: Victim conduct. It's clear, Your
14 Honor, what we've never addressed is why or how did this man
15 even get to being in this situation with me. Without him, it's
16 left to me to argue that, well, this is what this man is doing.
17 Anyone can see that it's plain. The gentleman followed us for
18 several minutes. And, yes, we could have did this; yes, we
19 could have did that.

20 In one of the phone calls you hear me say I told my
21 father, dad, just go home; if he follows us home, I'll deal
22 with it. There was an implication that that meant, oh, he
23 knows he's going to get behind. What I'm saying is, hopefully,
24 this man will go about his business, but if he does, I'm the
25 one with you; I'll deal with it. It had nothing to do with the

1 guns itself. It's any situation. If I was going to a store
2 and someone tried to harm my father, I would be the one to step
3 forward. You try to harm my mother, I would be the one to step
4 forward.

5 We still, to this day, don't understand. Okay, somebody
6 cuts in front of you. What makes you chase them throughout the
7 street and consistently try to stop and impede them from moving
8 and then try to get out your vehicle? What are you intending
9 to do? What's in your mind?

10 I need the Court to understand my mindset. I'm coming
11 from being in prison, where everything is reactive. You can't
12 let a person say they're going to do something because it will
13 actually cause you harm or cause you death.

14 And then all of these situations that we read in the
15 newspaper and see on the news. Just the other day I sat there
16 and watched the news report. A young guy shot somebody's
17 mother through their house because the son sold him a car that
18 broke down. These are the type of things that put me in the
19 state of mind that I was in. And it wasn't that I intended to
20 harm this guy, because if I wanted to harm him, I could have
21 harmed him.

22 THE COURT: But you do understand, though,
23 ultimately -- because we can sort of get almost sidetracked --
24 and I've been thinking about this point as I prepared for
25 sentencing, right? The conviction here isn't for you going

1 after them with the firearms. The conviction is for possession
2 of the firearms. The fact that you put them in your hand that
3 day, I think maybe you might have an argument that the victim's
4 conduct compelled that.

5 But to the extent that there seems to at least be a
6 pretty strong argument that, at the very least, you jointly --
7 like, you knew where to go for these firearms. I don't accept,
8 I never have accepted the argument that you just happened to go
9 looking for something to fight them back with and stumbled into
10 these firearms. I know that was your position. I don't accept
11 that. You knew where those firearms were because you and your
12 brother, perhaps, jointly possessed them.

13 And so how is that -- and you might not accept what I
14 just said, and that's fine, but I'm giving you the benefit,
15 just like I did for the government, of where my thoughts are to
16 see if you want to push back on that. How is the fact that you
17 possessed those firearms with your brother, you knew exactly
18 where to go and get them, how is that justified at all by the
19 road-rage incident?

20 THE DEFENDANT: Well, first of all, I've never not
21 said that I didn't know that my family members owned weapons.
22 Where exactly they were, I never knew specifically. But the
23 point is at the time that I took possession of the firearms,
24 it's because of the perceived threat that I feel, and we
25 wouldn't have never got to that point if this man had just went

1 on about his business.

2 THE COURT: You would have never put them in your
3 hands --

4 THE DEFENDANT: Yes.

5 THE COURT: -- if that never happened. But they
6 would have still been possessed by you and your family members
7 jointly. That's my view. I'm giving you the opportunity to
8 tell me where I'm wrong.

9 THE DEFENDANT: Actually, I've never possessed a
10 firearm -- I haven't picked a firearm up since 1999, which is
11 my first federal conviction for possession of a firearm during
12 a drug trafficking offense. Because of the penalties for that,
13 I chose not to ever pick up a gun.

14 And once again, like I said, I'm not saying that I didn't
15 know that there were firearms, but I did not know --

16 THE COURT: And you were able to exercise control
17 when you felt necessary.

18 THE DEFENDANT: Actually, no, I never knew where the
19 firearms was. As I said, I can make assumptions and I can make
20 beliefs, but the 52K -- the 52K.10 and 12, basically, it's
21 coming from my reaction to him, and because of his conduct,
22 this is why I took possession of firearms. Otherwise, I would
23 have never taken possession of the firearms.

24 As I said, the question that my brother is asking me, why
25 would you do that, it came from look at the circumstances; you

1 would have done the same thing. Not that, oh, yeah, I'm going
2 to go get the firearms, and I'm making this statement to my
3 aunt, and I'm saying, oh, well, I'm trying to get next to these
4 guns. I'm saying to her that I want to protect my family, not
5 that intended to go get guns to do anything.

6 THE COURT: I understand your argument on these
7 points. Anything else? You'll still get an opportunity to
8 address me in a more general sense on what your sentence should
9 be. Anything else in terms of guideline issues? I think we've
10 covered everything but --

11 THE DEFENDANT: I just have one point which is
12 dealing with the extended clip, because that's out there. It's
13 a part of the two-level enhancement for the base offense,
14 taking it from 20 to 22.

15 THE COURT: I didn't realize that was something you
16 were challenging. Okay.

17 THE DEFENDANT: I know the argument was about the
18 drug conviction but --

19 THE COURT: You're challenging that this was a
20 semiautomatic firearm? Is that --

21 THE DEFENDANT: Right, I'm challenging the
22 large-capacity magazine portion of it, because without that, it
23 goes to 20.

24 THE COURT: I see that. Okay.

25 THE DEFENDANT: And I had always made the argument

1 about that particular gun anyway, which is, under the law,
2 following the Constitution, there must be a commerce nexus in
3 order for the federal government to have any regulation over
4 it. And even though I know the Court is considering whether
5 you had it in your possession, I can consider it --

6 THE COURT: I'm sorry. You're not arguing that it
7 wasn't a large -- you're not arguing that it wasn't capable of
8 accepting a large-capacity magazine. You're arguing that that
9 item, because there's question about where it was manufactured,
10 is not covered by the commerce clause.

11 THE DEFENDANT: Well, I'm arguing both points. I'm
12 just addressing the commerce point right this moment.

13 THE COURT: Okay.

14 THE DEFENDANT: As the gentleman testified, there was
15 no commerce nexus for that particular firearm.

16 As to the extended magazine, it was never established
17 that it was able to hold more than 15 bullets inside of the
18 magazine, and because that wasn't established, that's another
19 point where the enhancement -- rather -- using 22 rather than
20 20 would come into play. Without one of these two things, it's
21 virtually impossible -- we're making the assumption that
22 because of the type of firearm, that it was a magazine that
23 holds 15 bullets, but they make firearms with the same length
24 magazine, but it wouldn't shoot more than 10 at a time.
25 Without these, I'm saying that I should be at 20 rather than

1 starting at 22.

2 THE COURT: All right. What's the government's
3 response to that last point?

4 MS. WRIGHT: Your Honor, two points. Special Agent
5 Leonard testified clearly this morning that the magazine would
6 hold 30 rounds. So I think that fully answers the question of
7 its capacity for this purpose.

8 In terms of the interstate nexus, the government's
9 position is that that doesn't apply separately from its merits.
10 It doesn't apply with respect to the enhancement because the
11 question here is just whether the events involved this type of
12 firearm. This was the second firearm on his person at the time
13 of the offense, and while interstate commerce is an element for
14 the actual charge under 922(g), or purposes of whether this was
15 a firearm involved in the offense, which was also on his
16 person, interstate nexus just doesn't come into play under the
17 guideline.

18 **THE COURT'S RULING**

19 THE COURT: All right, so there are a number of
20 guideline-related issues that we have spent all day addressing.
21 For those in the audience, there are two stages to a sentencing
22 in federal court. We've spent all of our time thus far on
23 stage one, which is where the Court has to determine what the
24 advisory guideline range is for the offense of conviction, and
25 then after that, in just a moment we'll go on to what the

1 appropriate sentence would be.

2 As to the very first issue, the issue we addressed or
3 dealt with this morning, which is whether the conviction -- I
4 just want to get it in front of me -- whether the defendant's
5 conviction for attempt to possess with intent to distribute 500
6 grams or more of cocaine qualifies under the guidelines as a
7 controlled substance offense, I find that it does not. I find
8 that -- my first question, as I had indicated during argument,
9 I broke the argument down into two pieces.

10 Let me also say, as I indicated before, I am going to
11 write something on all this, so I'm not going to go through
12 chapter and verse here. I'll just give some quick highlights.

13 But as I looked at this issue, I broke it down into sort
14 of two questions that the Court had to answer. The first one
15 was *Dozier* binding on the Court in this case, and I determined,
16 upon review of the case itself, that it's not. Footnote two
17 explicitly says that it's not addressing the issue before the
18 Court here, which I think gives the Court the opportunity to
19 address that without feeling bound by the holding in *Dozier*.

20 So then once I get past that, then I have to decide
21 whether or not it's applicable or not. Simply reading the
22 language of 4B1.2(b), the definition, I find that the guideline
23 just doesn't cover attempt for the reasons stated by the D.C.
24 Circuit Court.

25 The other issue that I then spent some time considering

1 is, in looking at the 4B1.2(b), the term "controlled substance
2 offense" means an offense under federal or state law punishable
3 by imprisonment for a term exceeding one year that prohibits,
4 and it goes on to list specific things. One of the questions
5 was, well, is attempt, in effect, a lesser included of an 841
6 conviction. Because, clearly, 21 U.S.C. 841 would be covered
7 by 4B1.2(b), whereas 846, the attempt statute, would clearly
8 not be.

9 We've done some initial research, and I'll do some more
10 before I put this into writing, but as I look at it as I sit
11 here now, it would seem, if nothing else, superfluous for there
12 to be an entirely separate statute for attempt, which is 21
13 U.S.C. 846, and then to also say that attempt is a lesser
14 included of 841. There's no language in 841 that deals with
15 attempt. 846 is its own separate offense, and I find that he
16 was convicted under 846, which is not covered by 4B1.2(b).

17 As a practical matter -- and maybe I'll be more careful
18 about this in the future -- I do think we frequently just list
19 841 there, but when you really hash it out and look at it, I
20 think the conviction falls under 846. That's what he was
21 convicted of. I don't find that that qualifies as a controlled
22 substances offense for the purposes of 4B1.2.

23 Next, we turn to the two-level enhancement for -- oh, I
24 should also say briefly -- I didn't put this in my notes until
25 just now. I do, however, find that it was a large capacity --

1 or capable of holding a large-capacity magazine, that is, that
2 it was able to hold more than 15 bullets based on the testimony
3 that was received earlier. I don't think the interstate
4 commerce clause -- although it obviously applies to the count
5 of conviction. Once the government has gotten past that
6 hurdle, I don't think I then have to apply it to whether or not
7 I consider that additional conduct, the possession of that
8 additional firearm, for purposes of guideline calculations. So
9 I do reject that argument of the defense.

10 So we start out with a base offense level of 20.

11 Then in terms of the two-level enhancement for stolen
12 firearm -- and I'm flipping back and forth, so you'll have to
13 bear with me a little bit because we have a number of things we
14 are considering. I have discussed sort of my distaste, I
15 guess, for this particular enhancement in a circumstance such
16 as the one we have here. Certainly, in a case where the
17 defendant himself stole the gun, in a case where the defendant
18 himself is aware that the gun was stolen, I have no concerns at
19 all -- and I've seen cases where those things were true, and in
20 those cases I have no concern about applying it.

21 It does give me pause, significant pause in situations
22 like this one, where there is no evidence of those things. So
23 it is -- and Ms. Wright put it well -- sort of just being
24 applied in a strict liability sort of way, which, frankly, I
25 think goes against the nature of individualized sentencing and

1 the idea that I'm trying to determine how this defendant
2 compares to other defendants convicted of the same crime.

3 Now, having said all that, the language of the actual
4 guideline is such that there's really no wiggle room for the
5 Court to say it doesn't apply as a technical matter. It simply
6 says "if any firearm was stolen, increase by two levels."
7 There's no argument that that's not met here.

8 So for the record, I find that that enhancement applies,
9 but I'm also saying that, you know, whether we call it a
10 variance or just in terms of how I am processing it for 3553
11 purposes, I'm not considering it in terms of the ultimate
12 sentence. So in calculating the guidelines, just to make the
13 record clear, it applies, but I ultimately will vary away from
14 actual use of that.

15 Regarding the four level -- so anyway, because I am
16 finding it applies, it does move the offense level to a 22.

17 A four-level enhancement related to possession of the
18 firearm in connection with another felony offense -- I'll
19 address both issues in writing, but I am going to find -- in
20 the interest of time, I'll just say that I am going to find it
21 does apply because I do find that he possessed the firearm with
22 the intent to commit first degree assault, and I find that
23 based on the jail calls indicating as such and the fact that
24 he, in fact, had them in his position. So I do find that that
25 four-level enhancement applies.

1 I have other thoughts on the drug offense for the
2 ammunition in his bedroom, but I'll deal with that in writing.

3 This enhancement does apply for the reasons I just
4 stated. So that brings us to a 26.

5 As I've already indicated, I'm not going to apply the
6 obstruction-of-justice enhancement. Simply looking at the text
7 of 3C1.1, I don't think it should be applied to a situation
8 where a defendant testifies in his own defense and is just
9 disbelieved by the jury. I don't think that's what it's
10 intended for. I think obstruction of justice -- if this were a
11 situation where he had done something to try to get his father
12 or someone else to testify falsely, if there was evidence of
13 that, I would certainly consider that obstruction of justice.
14 I do not find that in this scenario, under these facts, that
15 that should be applied. If necessary, I'll also flag it as a
16 policy disagreement, which is another basis for the Court to
17 reject that enhancement.

18 So that brings him to an offense level of 26. Although,
19 if I were not to consider the two-level enhancement for the
20 stolen firearm, that would make him a 24.

21 He has six criminal history points, plus he gets two
22 additional points because he was under a criminal justice
23 sentence at the time of this crime, which gives him a total of
24 eight points. He is a criminal history category four.

25 So I calculate his guidelines as offense level 26,

1 criminal history category of four, which means his advisory
2 guideline range would be 92 to 115 months.

3 I'll note for the record, again, my concern with the
4 two-level enhancement for stolen firearms. So if I were to
5 sentence him as a 24, his guideline range would be 77 to 96
6 months.

7 THE DEFENDANT: Your Honor, if I may --

8 THE COURT: Just give me one second, because I did
9 forget to also address the defendant's arguments -- there's a
10 lot to work through here, so you'll have to be patient. And
11 then anything I got wrong, you'll have a moment to tell me.

12 As to his arguments under 5K2.10, which go to issues
13 related to the victim's conduct, as well as the issue of
14 coercion, I do not find that those apply here for primarily the
15 point that I made in my discussions with Mr. Faison, which is
16 that given the evidence as it came in, it is certainly clear to
17 this Court he knew where those firearms were; he had the
18 ability to exercise power and control over them; he
19 effectively -- not effectively. The Court would find that that
20 would be sufficient for joint possession.

21 So even if one assumes that he was coerced or the
22 victim's conduct pushed him to put the guns in his hand, those
23 factors do not apply to his actual possession of the gun, which
24 I find that, under the facts, he possessed the gun before he
25 actually touched them that day. So I find that those downward

1 departures do not apply.

2 Certainly, the nature of the events in total will be
3 considered in the Court determining his ultimate sentence, but
4 that is how I determine the guidelines.

5 Mr. Faison, you wanted to be heard on something.

6 THE DEFENDANT: Yes, sir. There were two arguments
7 that I made that I forgot to address for the Court, if we can,
8 before you go further --

9 THE COURT: Very briefly.

10 THE DEFENDANT: The one is dealing with the prior
11 conviction on the three points for the 1997 conviction.

12 THE COURT: After I've already ruled -- I'll let you
13 be heard. Go ahead.

14 THE DEFENDANT: The problem is this was one of the
15 main issues that I believe that I made the argument that the
16 three points shouldn't apply to that particular conviction
17 because of the time period, and for purposes of appeal, I
18 believe I would need to address it.

19 THE COURT: I'll give you two minutes, if you need
20 that long.

21 THE DEFENDANT: Just if you take a look at it, the
22 PSI gives it three points, stating that 4A1.2(k), which
23 4A1.2(k) says if you have a revocation and you have the
24 original prior, they should be added together to give you one
25 sentence, which, the way that it's been applied, it would give

1 you three points.

2 My argument is if you look at it, the original sentence
3 stems from 1988. That would put that original sentence at 25
4 years. The next violation which I received a sentence from
5 would be 2003. That would put that in 15 year. The sentence I
6 received from it was a six-month sentence.

7 Applying 4A1.2(e), if you count it correctly, 4A1.2(e)
8 would put this at the 10 year mark, which means it's out of
9 time. The way they're applying it, they're taking it and
10 saying, okay, we're going back 25 years, coming forward 15
11 years, adding them together to make them count to make it a
12 three point.

13 If you look at my prior PSR from New York City, and this
14 was in 2009, when the sentence was 11 years old, they only give
15 me two points for that particular charge. Now, whether this
16 was a mistake or incorrect, I don't think that really makes a
17 difference, but it would be strange to find me at two 11 years
18 after the conviction, and then now, almost 25 -- well, 15 years
19 after the conviction you're giving me three?

20 I believe if the Court applies it the way it's supposed
21 to be applied, which 4A1.2(e) requires that the applicable time
22 period be counted first, not go to 4A1.2(k) and take a 15-year
23 sentence and a 25-year sentence, add them together and make
24 them accountable.

25 As to the other issue, it was the enhancements for the

1 stolen firearm --

2 THE COURT: Well, that's been addressed.

3 THE DEFENDANT: Right, but the issue that I wanted to
4 bring up was an *Alleyne* issue as to those three, which is the
5 stolen firearm, the large capacity magazine, and the criminal
6 justice sentence. Because I think the Court may take issue
7 with it if I bring it to them and never had addressed it in the
8 lower court, I just wanted to address that, which is *Alleyne*
9 says that any facts that raises the floor of my applicable
10 guideline range has to be alleged before the jury. So just for
11 argument sake and for preservation, those three issues I would
12 like to be placed under *Alleyne*.

13 THE COURT: I'll hear from the government,
14 particularly on the first issue that was raised, but you can
15 address both.

16 MS. WRIGHT: Thank you, Your Honor. With respect to
17 the calculation of the criminal history category, the
18 government reads the guidelines sort of on their plain language
19 the same way that Probation did. This had been brought to
20 Probation's attention and they --

21 THE COURT: I see that.

22 MS. WRIGHT: -- and they did the calculation, and I
23 think that is a fair reading of the guidelines. I don't think
24 we can account for why the previous PSR calculated it
25 differently. I think based on the way the guidelines read,

1 this calculation is correct. So we do support the PSR's
2 conclusion on the criminal history point. And, yes, like the
3 Court, we had assumed that was no longer being disputed at this
4 time.

5 With respect to the *Alleyne* issue, it's well established
6 the relevant conduct and the other facts can be taken into
7 account for purposes of sentencing. These aren't any facts
8 that need to be alleged and proven to the jury, so we'd
9 certainly take issue with that position as well.

10 THE COURT: So I had reviewed the presentencing
11 report and the fact that the objection had been raised to the
12 presentencing report writer, and the presentencing report
13 writer detailed the response to that on page 29, the third -- I
14 guess second full paragraph.

15 So for the reasons articulated, I'm going to deny
16 defendant's request on that issue, although he has now
17 preserved it for the record.

18 And likewise, for the reason the government just
19 articulated, I deny his argument as to the manner of proof,
20 whether or not it needs to be in the indictment or not. I
21 reject that argument for the reasons articulated by the
22 government. That is also now preserved for the record.

23 Anything else as to the guidelines that we have not
24 addressed?

25 THE DEFENDANT: No, Your Honor.

1 THE COURT: Anything else from the government?

2 MS. WRIGHT: No. Thank you, Your Honor.

3 THE COURT: So now we are finally prepared to move to
4 the 3553(a) factors. Obviously, I did already have an
5 opportunity to review the victim impact statements. I don't
6 know if any are here presently that you wish to present to the
7 Court. If not, I'll hear from you, Ms. Wright.

8 MS. WRIGHT: No, none are present, Your Honor. Thank
9 you.

10 THE COURT: I should also note while we're -- it
11 would seem to make sense that we address the violations of
12 supervised release. I'll hear argument from you on both of
13 those issues. It seems like given that -- well, one, I'm also
14 looking at the time, and so I'm not going to go back through it
15 twice. But it seems like given that the violation stems
16 entirely from this offense, I'll hear your recommendation as to
17 sentencing on this case, and I'll also hear from you at the
18 same time as to your recommendation for how I handle the
19 violation of supervised release. If you need a minute, now
20 that I've perhaps thrown you off, you can take a minute, but
21 you can address both at the same time.

22 MS. WRIGHT: Thank you, Your Honor.

23 THE COURT: Just for the record, the violation of
24 supervised release is docketed at GJH-18-607.

25 **ALLOCUTION BY MS. WRIGHT FOR THE GOVERNMENT**

1 MS. WRIGHT: Thank you, Your Honor. So looking first
2 at the 3553(a) factors here, the government does continue to
3 recommend its sentence of imprisonment of 10 years for the
4 defendant, and that is for the reasons subscribed in our
5 filings leading up to the hearing and based on the evidence at
6 trial and presented this morning. We understand that with the
7 Court's calculation of the guidelines, this would be a slight
8 upward departure for the guideline range for offense level 26.

9 THE COURT: That's correct.

10 MS. WRIGHT: Thank you, Your Honor. And then a
11 somewhat more substantial upward departure with respect to the
12 offense level 24 that the Court is otherwise considering. But
13 we do think, based on the other aggravating factors here -- or
14 upward variance, excuse me -- that based on the various factors
15 here, a 10-year sentence is the appropriate sentence in this
16 case, considering all of the other factors.

17 So the defendant seeks to cast himself as a protector,
18 but the evidence in this case shows that he is not. The
19 evidence shows truly that this defendant is a danger to the
20 community.

21 The government does not belittle favorable things that
22 the defendant has done in providing care for some members of
23 his family on particular occasions, which he mentions, and the
24 government does not condone that the counterparty to the
25 road-range incident was the initial aggressor at the time of

1 this offense, but we are very concerned about the fact that the
2 defendant did nothing, despite things that were in his power to
3 do, to deflect the situation or defuse it once that road-rage
4 incident came about. He made no choice to apologize or reduce
5 tension or to go straight to the police department at that
6 point.

7 The evidence to the contrary shows that he exacerbated
8 situation at every turn. The evidence showed that he led the
9 counterparty home in order to get the guns, in order to harm
10 himself. Those guns were already at his house, and he knew it.
11 We think there is no other reading of the statements that he
12 has made in this case. He possessed them, whether himself or
13 jointly with his brother, before anything with respect to the
14 road-rage incident occurred, and the evidence showed that the
15 92 remaining rounds of matching ammunition were in his bedroom.

16 We think the defendant's claims that he never knew where
17 the guns were, that he hadn't, quote, unquote, possessed any
18 firearm since 1999, are just plainly contradicted by the record
19 here and by the history of the statements that he has made in
20 this case.

21 As the Court has found, the evidence shows that he left
22 that house to find the counterparty, after this altercation had
23 occurred, in order to kill him, and, fortunately, the police
24 found him, and he was caught in the act. But as he himself
25 noted, if the police had not been there to intervene, then we

1 could be here for a much different kind of case, and that's
2 only due to factors beyond the defendant's control, since he
3 lost control in undertaking the actions that he did on that
4 morning of September 5, 2018. And we're basing this, again, on
5 his own words when he did not have an incentive to lie.

6 The evidence shows that the defendant is a manipulator.
7 The government referred in its closing argument at trial to
8 there being two stories. As the defendant has continued to
9 speak, additional versions of the story continue to appear. I
10 brought a version of the slide that the government had referred
11 to, with respect to the two stories, that showed that what the
12 defendant was saying at trial just did not match his previous
13 statements or what the true facts showed. Certainly, it was
14 undisputed that there was a road-rage incident, and that was
15 unfortunate. But at each further point, the defendant, as the
16 government views it, was trying to alter the facts, to
17 manipulate the facts, and change the story in order to make it
18 appear like he was justified and in order to conceal what
19 actually was happening.

20 In the evidence leading up to the sentencing hearing too,
21 there were even additional stories on various points. In
22 exhibit G to the sentencing memorandum, the government enclosed
23 additional clips of body camera coverage of the defendant at
24 the time of the arrest. In those statements, he claimed that
25 the firearms had been -- he found them under his house 15 years

1 prior. Now, we know that can't be true because one of the
2 firearms was stolen only 10 years prior to that point, but it
3 goes to show that at each stage when he's being asked these
4 questions by the police, he is making up different accounts of
5 the events because the truth is not on his side. The truth
6 shows that he was a danger to the community. He knew exactly
7 where those guns were, and he went to get them in order to then
8 be armed for the attack that he set off to accomplish against
9 the counterparty.

10 So the government is very concerned, as we've gotten to
11 this point, that the defendant has continued in what we
12 consider this fantastical story about what happened this
13 morning, rather than accepting responsibility for what he did
14 and the consequences of his actions.

15 The other evidence this morning that showed the
16 additional stories that he's telling was the story -- his
17 statement that he would have -- the next time -- I mean, he's
18 learned his lesson; next time he'll call the police. That
19 contradicts his claim that he was on his way to see the police,
20 and it acknowledges that he was not intending to seek any
21 intervention or diminish the situation at all on September 5,
22 2018. The true facts are that he was even going to run from
23 the police, as he said in his jail calls, but he couldn't
24 because one of the guns was too big to try to run with.

25 So the stories he is telling are not true. They are

1 fabricated for purposes of reducing his culpability in this
2 case.

3 We also think that the fact of the defendant's lack of
4 credibility on other points supports the finding that the
5 ammunition was plainly his. This was his bedroom. If he
6 weren't generally there, certainly, his father, who had reason
7 to try to help out his son at the time of the arrest, would
8 have mentioned that. He would have said to the police my son
9 doesn't really stay here. He wouldn't have listed the four of
10 them, the parents and the two sons, as those that lived in that
11 residence. But the defendant's father didn't describe meeting
12 the defendant out somewhere that morning. He described the
13 defendant living there, and only himself, his wife, and the two
14 sons living there, and he said that this was the defendant's
15 room.

16 It's really important also that the defendant's brother,
17 Larry Newman, Jr., had his own room. As the Court learned from
18 the evidence this morning, he had significant quantities of
19 drugs in his room. He had his own firearm in that room. So
20 there was no need for him to be keeping his other drug
21 paraphernalia in the defendant's room. Certainly, as we noted
22 earlier in connection with one of the arguments, that is not
23 something anyone does. You don't put this type of thing in
24 someone else's room who is not fully complicit, if not
25 participating, in the criminal conduct that those things show.

1 It was also central to the defendant's argument and to
2 his defense that the victim had a weapon, and he testified that
3 that was a key fact to supposedly understanding what he did
4 that day. But the evidence showed that the defendant never
5 told this to his family and friends. And if there had been a
6 weapon, it is ridiculous to think that the defendant would not
7 have mentioned that in explaining what had happened.

8 I'd also note that of interest now, given the defendant's
9 story, is that in the body camera footage submitted as exhibit
10 C to the sentencing memorandum, the officer who is talking to
11 the two individuals who were the victims in the road rage --
12 well, initial aggressor and then became the victims of
13 Mr. Faison's threats upon the road-rage incident, looks through
14 the vehicle, and it does not appear to the government to show
15 that there was any vehicle security device, such as the
16 defendant claimed for the first time and only at trial, had
17 been -- or for the first time at trial, had been somehow
18 wielded by the driver. Instead, we point to the statements at
19 that moment, right after the incident had occurred, where the
20 two victims of Mr. Faison's threat were describing what had
21 happened and that they were scared off by the defendant. That
22 was plain in the interview, and their accounts matched in terms
23 of the story that they were telling about what had just
24 happened to them at the defendant's hands.

25 So the defendant was not a victim, and his stories only

1 go to show how well he understands that he was not justified in
2 this case.

3 So his lack of acknowledgment of the seriousness of his
4 conduct or his responsibility for it is part of what greatly
5 troubles the government, and that factors into our concerns
6 both for the guidelines and with respect to Section 3553(a).

7 As the defendant's criminal history shows, he has been
8 undeterred in the pursuit of illegal activity and,
9 specifically, the illegal possession of firearms, for his
10 entire adult life. And even though he was on supervised
11 release in this case, he proceeded, knowingly, to, at the
12 least, have access to these guns at his house, such that he
13 could go get them, as he himself said on the date was his
14 purpose, and then he chose to set out to make use of them by
15 pursuing the counterparties after the road-rage incident.

16 We do understand the sympathy expressed in a letter from
17 one of the jurors to the defendant, and, certainly, the
18 defendant sought to be -- I mean, certainly, it's unfortunate
19 what happened to him in the initial part of the road-rage
20 incident, but the facts show that his reaction was not
21 proportionate, it was not appropriate, and he should not have
22 been previously armed so as to be able to take those actions
23 when it happened. That's the key to the government's concern.

24 The jury did not get to hear additional things about the
25 defendant such as the Court heard in the evidence today. And

1 the defendant also wanted the jurors' sympathy. He went out of
2 his way at trial to try to cultivate that sympathy. He opened,
3 in fact, his closing argument stating that he had a new son,
4 which is, obviously, not related at all to the evidence in the
5 case. That was, again --

6 THE COURT: That's what a lawyer would have done on
7 his behalf though.

8 MS. WRIGHT: Well, I think the lawyer would have had
9 more trouble saying various things on behalf, but, certainly,
10 it's a persuasive point since we are human beings, and we have
11 natural human sympathy, but in terms of -- and the government
12 does mention this in its response memorandum too, but in terms
13 of the defendant's culpability, we think that counts against
14 him. He has all this additional to lose, and he made the
15 choices on that date.

16 One of the -- the fourth clip that the government played
17 this morning from the jail calls, that was on the eve of trial,
18 and the defendant refers to the fact that he had been going to
19 hurt someone that day because, again, he was angry, and he had
20 to have -- and someone else had to intercede and refocus him
21 on, no, this is -- you got to focus on your trial; you've got
22 to go to the library. But the fact that even while he's locked
23 up and knows that the stakes are that high, that he was not
24 exercising control, that he wanted to hurt someone, he said
25 even though he knew it would get him another charge, he was

1 prepared to do that. That is of significant concern for his
2 dangerousness and his willingness to comply with the rules of
3 society if even in jail, on the eve of trial, he's not acting
4 or choosing to act in a manner to protect other people's safety
5 absent intervention by an outside source.

6 And I do want to be clear pertaining to one of the other
7 points of the Court. Certainly, the defendant is entitled to
8 put on any defense, evidence, no evidence at all, and all that
9 the government is taking issue with here is the fact that we
10 think he lied. He was actively attempting to mislead the jury
11 in order to avoid responsibility for what he did.

12 THE COURT: I don't want to go back down this road --

13 MS. WRIGHT: Of course, Your Honor, I was pausing
14 to --

15 THE COURT: Well, no, no, no, I know, but -- I don't
16 know. Now I can't help myself. Isn't that just what trial is
17 though, two competing notions? One is always going to be
18 accurate, and one is always not, and the jury is here to try to
19 figure out. Whether he takes the stand or not, this side is
20 trying to say that this set of facts happened; this side is
21 trying to say that that set of facts didn't happen, and the
22 jury decides. I can't wrap my mind around punishing him
23 because, as part of that, he takes the stand. I just can't
24 wrap my mind around that.

25 MS. WRIGHT: And that part is totally understood,

1 Your Honor, and that's not what we're trying to punish him for.
2 It is for, as we think is shown by the evidence here, lying on
3 the stand and clouding the facts, rather than explaining what
4 actually happened and seeking the jurors' concurrence,
5 essentially, in what actually happened.

6 So based on what sort of actually happened and the
7 violence in the defendant's conduct, we do think that this
8 sentence is necessary for deterrence and to protect the public,
9 and also to reflect the defendant's very alarming history of
10 concerning conduct with firearms and continuous attempts to get
11 firearms, even when it had been in violation of the law. The
12 fact that he engaged in this activity and had these firearms
13 and other items in his room, which I'll talk about momentarily,
14 despite the previous terms in prison, including, first, a
15 five-year federal term, then at least an 11 year, as it turned
16 out, federal term and still chose to have all the tools there,
17 in terms of the firearms, to undertake violent activity is a
18 major concern.

19 The drug paraphernalia and other items in the defendant's
20 room are also of major concern to the government because it
21 shows, again, an utter disregard for the fact of being on
22 supervised release. Even if he was not the one that was
23 actively manufacturing this paraphernalia -- excuse me,
24 manufacturing these drugs, despite the paraphernalia being
25 stored in his room, then he was at least complicit in it and

1 trusted enough in that enterprise that there was no concern,
2 evidently, whatsoever of leaving all those items in his room.
3 That is not the behavior of someone who has changed his ways
4 and wants to demonstrate his compliance on supervised release
5 and his ability to show his reform when he has reentered
6 society.

7 Having the guns and ammunition and the drug items also
8 being in his room is also not the only alarming activity. The
9 government doesn't want to ignore the fact that he was very
10 close to having silencers, along with the guns, in his room.
11 The point of the clip that the government played with respect
12 to the silencers was the fact that, yes, Mr. Faison was
13 describing a claim that the government had been making, that he
14 had the silencers, but what he said in response to that was
15 that the basis for the government's argument was because "I had
16 flashlight parts in the room." He did not say that it was
17 because there were flashlight parts in the room. He was
18 acknowledging and slipped up there, in the government's view,
19 to acknowledge that these were his items, again, in the room.

20 The main piece of -- the main personal item that the
21 defendant asked about in his room, as was reflected in the
22 evidence at trial, was that Samsung tablet, and on the tablet,
23 in the months from April through August 17th, the testimony was
24 today there were searches for getting silencer parts. And
25 there was a drill in the room, and the testimony was that the

1 only thing that separated these items from being silencers were
2 the fact that they had not yet been drilled. Everything else,
3 in terms of the baffles, fit in.

4 This was on the bed, right next to this pack of papers
5 that had additional notes that, obviously, were at least
6 trusted to be in the defendant's room, in the defendant's
7 personal paperwork. There's employment paperwork. There's
8 this paperwork from his 2007 case. We don't think there can be
9 any credible argument or truly argument at all that these were
10 not items that he was, at the least, perfectly comfortable
11 having all around him.

12 We think the suggestion to the contrary is that these
13 were all things that he was preparing to use for additional
14 nefarious purposes, likely connected with the distribution of
15 the controlled substances. There is no legitimate purpose,
16 and, certainly, there would be additional enhancements, both in
17 terms of the VOSR and other charges, had these actually become
18 silencers. But the fact that they were so close to being
19 silencers is a major problem. Again, these are contraband
20 items that one would not leave in someone else's room,
21 especially if, based on the testimony at trial, there were
22 children all over, in and out of that room, if that person was
23 not fully complicit in the activity. That fully defies common
24 sense. And the fact that these items were his in his room is
25 the only reasonable conclusion we think here.

1 So, Your Honor, I will leave that as the argument with
2 respect to the 3553(a) factors and our recommendation.

3 In terms of the VOSR evidence, we do think the violations
4 listed here with respect to both the PWID, which he was at
5 least aiding and abetting and was accountable for at least
6 illegal possession of the firearm, the use or possession of a
7 controlled substance, based on what was in his room, and there
8 was the PCP itself in his room, again, as well as --

9 THE COURT: On the petition I have, I just see a
10 violation three and four. I literally just noticed this. Is
11 there no violation one and two? Have those been dealt with?

12 MS. WRIGHT: I believe those are on their way to you
13 as we speak. Yes, there are violations one and two, and I will
14 note that they are essentially, in parallel, all based on the
15 state charges at time --

16 THE COURT: But they're all related to the same set
17 of charges.

18 MS. WRIGHT: Yes, Your Honor, they're all related to
19 the same set of charges, and the key differences are what
20 conditions of supervised release were violated. Numbers 3 and
21 4 were adding the violations with respect to committing another
22 state, federal, or local crime, and the first two were sort of
23 the substantive violations, where Mr. Faison was prohibited
24 from possessing a firearm or ammunition, and then when he was
25 prohibited from possessing a controlled substance.

1 THE COURT: Got it.

2 MS. WRIGHT: So we think all of these violations have
3 been established by the evidence that has been put forth. The
4 evidence shows, based on the preponderance, which is all the
5 current standard that is, was that he had all the tools for the
6 manufacture and residue for cocaine and cocaine base in his
7 room, in his own room, along with PCP.

8 The fact that it corresponded to the drugs in Larry
9 Newman, Jr.'s, room we think strengthens the case for the
10 violations, rather than in any way diminishing it, in showing
11 that they were partnered in this activity, even though one
12 happened to have the drugs in his room. And the fact that,
13 again, Larry Newman, Jr., had his first reaction, when they got
14 to the house, that they took everything and that that was what
15 he wanted to convey to his brother shows the complicity of them
16 in this activity.

17 A grade A violation could also be established here in
18 terms of the violation of federal, state, or local law by
19 virtue of the first degree assault, which we think has been
20 plainly established.

21 So on any of those bases, we think each of those
22 violations has been proven up here based on the defendant's
23 conduct.

24 The silencers presence would also provide an independent
25 basis for a grade A violation for the possession of silencers.

1 So that's something that also informs a recommended sentence,
2 which is at the high end of the guideline range for the VOSR as
3 well because there were just so many aggravating factors in
4 terms of his conduct here.

5 And this was very concerning to the government also by
6 virtue of the fact that this was federal supervised release.
7 Mr. Faison knew the system. He had previous federal
8 convictions, both involving a gun out of D.C. and this drug
9 crime out of EDNY, and then he had both guns and the drugs
10 right here, which shows a full disregard for the purpose of
11 supervised release and the trust that the Court had placed in
12 him by releasing him to supervision at that time. He had only
13 been on supervision for approximately a year at the time all of
14 these things happened, and the research on the silencer parts,
15 that were on the tablet that Mr. Faison asked about and that
16 was on his bed at the time, started within six months,
17 approximately, of when he was released on supervision.

18 Mr. Newman, Sr., testified at trial that he also had
19 prohibited his son from bringing guns into the house. So
20 Mr. Faison was disregarding that directive too, as well as the
21 law here, and that highlights also that there was no legitimate
22 reason whatsoever for him to have these guns. That gives the
23 plain implication, too, that they were processed in connection
24 with, again, the drug trafficking by both sons, that Mr. Faison
25 was at least partially complicit with, and we think that does

1 justify revocation of the terms of supervision and imposition
2 of the recommended sentence.

3 We would request that the sentence run consecutively to
4 the sentence on the underlying offense, at least in part. We'd
5 note that -- we understand that Mr. Faison does receive an
6 increase in the offense level of -- I think it's between 14 and
7 17 months by virtue of the fact that he was on supervision, and
8 we would propose to deduct that out of the term of a revocation
9 sentence that he receives, to avoid double counting on that
10 front. But, otherwise, we do think that a significant penalty
11 for the independent violation of trust that's shown here by the
12 criminal conduct needs to be imposed, and that combined, those
13 two create the appropriate sentence in this case.

14 THE COURT: Mr. Faison, typically I advise the
15 defendant -- and, for the record, I am advising you -- that you
16 have an absolute right to address the Court before I impose
17 sentence. I also say that you're not required to speak, but
18 I'm eager to hear anything you have to say if you wish to
19 speak. Since you have been representing yourself this entire
20 time, I presume that you do wish to speak both as counsel and
21 as defendant, and so I will hear from you as to what you wish
22 to say.

23 **ALLOCUTION BY THE DEFENDANT**

24 THE DEFENDANT: Yes. The government is very good at
25 mischaracterization. Dealing with -- and I know you have

1 already set your mind to your position on this, but dealing
2 with the chasing of the individual, one of the guns were
3 unloaded. I mean, how can I harm somebody with an unloaded
4 firearm? If you consider this, it shows my intent. I didn't
5 even know that the firearm was loaded or unloaded. It just so
6 happened that one was and one wasn't.

7 THE COURT: To state the obvious, it only takes one
8 to be loaded to do the harm.

9 THE DEFENDANT: Right. But this goes to my intent
10 once again. If I intended to harm somebody, I wouldn't carry
11 an unloaded firearm. That makes so sense. That means I choose
12 one or the other to do something that I had the intent to do.

13 But as to the running from the police, there was a
14 conversation. And as I said, we are listening to partials.
15 The question was asked of me, "why didn't you get out and run?"
16 I said, "how can I get out and run with a big old gun?" Not
17 that I intended to run. It was just an answering of the
18 question.

19 As far as the conversation about me saying, oh, from here
20 on out I will call the police. As I said, my initial
21 conversations were being made in anger, being made in
22 frustration. The later conversations, when I had time to
23 settle my mind, these are the type of things that I'm
24 communicating to people. Like, you know, I don't -- this is
25 not something I want to be a part of. I've been a part of

1 criminality all my life, where you don't call the police, where
2 you don't deal with the police. But now I'm saying in order to
3 become a regular citizen, to become valuable to society, I have
4 to make that better choice, to be able to say I'm willing to
5 call the police when I need their assistance.

6 Now, the government addressed a portion of when, in the
7 video, Mr. White, in the vehicle, was checked by the officer.
8 But what they did not convey was Mr. White was left several
9 minutes alone by himself. So anything could have happened from
10 the time that the first officers left to when the second
11 officer pulled up.

12 Once again, my possession was not in criminal intent. It
13 wasn't intended for criminal purposes. I have not touched a
14 firearm in 25 years. This particular charge was based on
15 reaction to this individual.

16 As far as whether or not I accepted responsibility, once
17 again, Your Honor, this is my family. I am never going to say,
18 oh, I apologize for protecting my family; oh, I apologize for
19 reacting to a threat to my family. Do I regret the situation?
20 Most of my conversations that were not played here, you'll hear
21 that I say this.

22 You'll hear me say I'm being taken away from a brand new
23 child, the same issue I put before the jury. This is why we
24 have a lot of children growing up, and they become adults with
25 no common sense. I had one son that I had a chance to spend

1 time with and raise in a manner, and today he is 24 years old
2 and has never had any issues with the police, the courts or
3 anything. He graduated from high school. These are the type
4 of things I want for the new one.

5 In trial, I admitted to the jury, in opening and closing
6 and all through, yes, I possessed the firearm; yes, I am a
7 felon; yes, I know I was a felon. My purpose in trial was
8 reserving my issue of the 922(g) not being under the commerce
9 clause and being able to put forth the defense of
10 justification.

11 As far as the conversation about the flashlights in the
12 room, once again, the government is admitting I'm having this
13 conversation about what they brought out. The way I
14 communicate it does not mean I'm saying, oh, they belong to me.
15 I'm saying what the government is saying, I had flashlights,
16 and that's why they're trying to give me this enhancement and
17 say that they're silencers.

18 The government continuously says that I am complacent in
19 the activities of another family member. They once before
20 mentioned that my mother and father, how can they not know
21 about things taking place right up under their nose. We're
22 adults. I don't get into my brother's business; he doesn't get
23 into mine. My parents don't come and get into our business.

24 As I've said before and in my other letter, the things
25 that take place with my brother, my brother and my father clash

1 over those things, but, once again, your children are your
2 children. You don't exercise them for things that you feel
3 that, as adult, they do that don't make sense to you, even when
4 it's against everything that you request. But at the same
5 time, complacency is not acquiescence. Just because I may
6 understand what he does does not mean I agree with it. Just
7 because my father may have issues with him about what he does
8 doesn't mean he says, oh, it's okay.

9 People can't force an adult to do things correctly.
10 People can't get adults to see the frame of mind that when you
11 do something, it affects everyone. My actions affected me and
12 my family. When I first was arrested, my mother was upset, but
13 when my father explained the situation, my mother said, son, I
14 understand, but I told you, I told you do not let these guys
15 trick you into anything. You come from a different generation;
16 you come from a different attitude.

17 Now, I asked about the tablet in the room because I had
18 money under it to pay my phone bill, and the conversation
19 reflects that. I'm not the only person that used that tablet
20 in there.

21 The questions about creating silencers and drug
22 paraphernalia and we both are taking part in this, once again,
23 Your Honor, knowing is not accepting. You can talk until your
24 head falls off about what a person does and try to explain to
25 them and try to tell them. As my father said, I tell my

1 children don't bring it in my house, don't do this, don't do
2 that, but it doesn't change if you're an adult and you make
3 your choices.

4 But once again, that wasn't a part of me. That wasn't a
5 part of the life that I was coming home to. My day was spent
6 dealing with my grandmother, dealing with my aunt. Both of
7 them wanted to come and speak, but my grandmother has
8 Alzheimer's. My mother said she would never let her get up
9 there and make herself look crazy. My aunt is 92 years old. I
10 didn't want to put the pressure on her. Ms. Eidell said she
11 (would go get her. I thought about it. That's too much stress
12 just to come and say this is what this man does for us; this is
13 the type of individual we have.

14 I've never said that I don't get upset, but I don't have
15 a history of any violence. If that's the type of individual I
16 am, I would be like other people that have assaults, this,
17 that, violence, violence. I don't have these things. Not to
18 say that my attitude doesn't reflect a certain way that I am,
19 but it comes from, as I told you, the way I was raised, the
20 people I was raised around.

21 Being in prison most of my life, I have to adapt to
22 society again, but at the same time, this is what I was raised
23 under. This is what I'm dealing with. This is what I'm coming
24 from. I'm coming from people who don't have an understanding
25 of being a normal citizen anymore. They've adapted to a whole

1 different way of life, and I had to do the same thing. It's
2 only been a year. I hadn't had the chance to really change my
3 way of thinking, even though I tried and I wanted to. But as
4 you can see, I reacted because that's what I was used to doing,
5 reacting to a threat.

6 I want to ask that Ms. Griffin be able to speak as to
7 just my general inner workings with her during the time period
8 that I was on probation. You'll hear from her that she never
9 had a problem out of me. All my urines were clean. Whenever I
10 was told to report, I reported. Anything that was required of
11 me that she needed, I provided. When she told me she had to
12 come past the house, I was there for her. I wasn't being a
13 person who was trying to go back to a life that I didn't want
14 anymore.

15 Once again, what my brother does, he's an adult. That
16 man is 34 years old. His choices are his, regardless if I know
17 about it, regardless if I see it. That's not for me to say he
18 doing this; officer, come get him. It's not for me to say you
19 got to leave your parents house when they won't even put you
20 out. But none of that should reflect on me in a manner that
21 makes it seem as if I'm doing this and I know about it; I'm
22 taking part in it.

23 At no point during my one year at home could it be
24 pointed to that I did anything or had anything that can show
25 that I'm dealing drugs. I had to borrow money from my parents

1 on a regular occasion until I got money from the food that I
2 would sell and the cars that I sold. And in turn, as my mother
3 testified, I gave her money from that to pay bills.

4 3553 says that it should be a necessary for the sentence.
5 I'm 50 years old. Is it really necessary to give me several,
6 eight years of a situation of simple possession of a firearm?
7 From day one I've said yes, I possessed this firearm; yes, I
8 wasn't supposed to possess it. But it was in reaction.

9 And I understand your thought process on you believing
10 that I knew about these firearms and I was in possession of
11 these firearms with my brother, but this isn't how it was. But
12 I'm not going to say that I didn't know about firearms. Once
13 again, I knew about the firearms, but it was never my intention
14 to possess them. But in understanding the life that I come
15 from, you have a person chasing you. I don't know how this man
16 is going to harm me. When I saw what I saw, I reacted to him.

17 It is never my intent to harm anybody. That's why I
18 don't have such things on my record. My largest crime is
19 drugs. That's what I've done all my life. With the last
20 sentence, I chose a different way. Once again, the only people
21 that can say it, I didn't want them to say it. I don't want to
22 bring my mother and have my mother say what she knows my son
23 does. I don't want my father to say I know my son does this,
24 because that has nothing to do with why we're here. We're here
25 because I possessed a firearm. The case has turned into now

1 I'm a drug dealer again; I'm making silencers; I'm violent.
2 And nothing reflects that other than something they found in
3 the home.

4 As for my rambling, I'm done with that, but I would like
5 to address the violation. I believe there's an issue as far as
6 my criminal history score, which they have it as a category 5
7 on the --

8 THE COURT: I have it as a four here. Am I looking
9 at the wrong --

10 MS. WRIGHT: You have the correct one, Your Honor.
11 Probation subsequently amended that in response to the
12 defendant's concern.

13 THE COURT: I have you as a criminal history category
14 4.

15 THE DEFENDANT: Okay. And they have it listed as a
16 class A felony. I'm assuming that the class A is just based on
17 the understanding of how the violation occurs, but it says here
18 in the commentary notes that where the defendant is under
19 supervision in connection with a felony conviction or has a
20 prior felony conviction, possession of a firearm, other than
21 the firearm described in 5845, would generally constitute a B
22 violation because 922(g) prohibits a convicted felon of
23 possessing a firearm. The term generally is used in proceeding
24 sentence; however, because there are certain limited exceptions
25 to the applicability of 922(g), which is under 925, and 925 is

1 essentially when you use it for hunting purposes or something
2 like that.

3 But I believe I shouldn't have a class B violation based
4 on this, because the -- I believe at the time that the arrest
5 was done, it was essentially just the firearm charges, and then
6 the drug charges were later added. Yeah, I think if you look
7 at page 2 of the -- I'm not even sure if you have -- Your
8 Honor, which copy are you looking at of the violation report?

9 THE COURT: I have a number of documents here in
10 front of me. I have petition number 1 and petition number 2,
11 and then I also have a violation report.

12 THE DEFENDANT: I believe it's the violation report
13 dated December 13th.

14 THE COURT: I have one more recent than that. Then I
15 have a document dated December 14th, a document dated March
16 6th, and then the violation report of January 8th.

17 THE DEFENDANT: Okay, well, we'll --

18 THE COURT: If there's a document you have, you can
19 ask Mr. Miller to bring it up to me if there's something you
20 have that you want to make sure I have.

21 THE DEFENDANT: Yeah, I just want to make sure we
22 have the same one that --

23 MR. MILLER: Your Honor, the violation report that
24 I'm holding here is dated December 13, 2018.

25 THE COURT: I don't have anything in front of me

1 dated December 13th, so.

2 THE DEFENDANT: And I don't have the new one that you
3 obviously have.

4 THE COURT: If you show me that, I'll let you whether
5 or not it has the same information. It might just be stamped
6 differently.

7 (Document handed to the Court.)

8 THE COURT: That page 2 looks the same as my page 2.
9 Mine is dated January 8th though.

10 THE DEFENDANT: Okay. So what I was addressing is on
11 the date of the arrest, as you can see, the first part of it,
12 nothing was there except the firearms. The drugs were added in
13 November. That would make the violation a B class violation
14 because it only applied to the firearms at the initial arrest.

15 Now, once again, I don't know where the class A is coming
16 from, but I'm assuming that's what it was, because the drugs
17 were added in November of 2018.

18 I believe that's all I have to address.

19 Oh, okay. He just brought something to my attention
20 which I did have wrote down.

21 THE COURT: Your very active standby counsel is
22 making one last point.

23 THE DEFENDANT: When you read the commentary dealing
24 with 922(g), it says grade A violations are conduct
25 constituting a federal, state or local offense punishable by a

1 term of imprisonment --

2 THE COURT: Slow down a little.

3 THE DEFENDANT: -- Exceeding one year, that is, a
4 crime of violence, or a controlled substance, or involves
5 possession of a firearm or destructive device described in
6 5845, or any other federal, state or local offense punishable
7 by a term of imprisonment exceeding 20 years.

8 And the grade B violations involves conduct constituting
9 a federal, state or local offense punishable by a term of
10 imprisonment exceeding one year. That would be the 922(g)
11 because it carries a mandatory maximum of 10. It falls under
12 the 20 year that's listed in A.

13 THE COURT: Anything else, sir?

14 THE DEFENDANT: That's it.

15 **SENTENCE**

16 THE COURT: Just give me one moment to look over my
17 notes, and then I'll issue my ruling.

18 So after calculating the guidelines and departures and
19 hearing argument, I must now consider the relevant factors set
20 out by Congress at 18 U.S.C. 3553(a) and ensure I impose a
21 sentence sufficient but not greater than necessary to comply
22 with the purposes of sentencing. These purposes include the
23 need for the sentence to reflect the seriousness of the crime,
24 to promote respect for the law, and provide just punishment for
25 the offense. The sentence should also deter criminal conduct,

1 protect the public from future crime by the defendant, and
2 promote rehabilitation.

3 In that regard, I've considered the nature and
4 circumstances of the offense, the history and characteristics
5 of the defendant, the need to avoid unwarranted sentencing
6 disparities among similarly-situated defendants, and the types
7 of sentences available.

8 The defendant was born in 1972 in Washington, D.C. Both
9 of his parents were involved in his upbringing. He now has a
10 number of children of his own. He has no prior history of
11 mental health treatment or substance abuse.

12 I apologize. Mr. Faison specifically asked that I hear
13 from Ms. Griffin, who is here on the violation, and I just -- I
14 had written a note to myself that said "Griffin," and I looked
15 up and saw that as I was going through my notes. So I will
16 hear from you, hopefully, relatively briefly, but I will hear
17 from you as to Mr. Faison's conduct since he's been on release.
18 And then I will restart my comments.

19 **COMMENTS BY PROBATION OFFICER GRIFFIN**

20 PROBATION OFFICER GRIFFIN: Your Honor, Mr. Faison
21 began his supervision in September 2017. I supervised
22 Mr. Faison the entire time. When he first started supervision,
23 he enrolled in Prince George's County Community College. He
24 was enrolled in an emergency medical technician course. He was
25 doing fairly well.

1 I would go out to see him at the residence. There were
2 several times that I saw him, he was working on cars. He told
3 me that he purchased cars from an auction, and that's how he
4 made his living.

5 Whenever we asked him to report, he would report in to
6 the office. He would provide us with whatever documents we
7 asked.

8 Overall we had no problems with him. It wasn't until he
9 was arrested for these charges that are currently pending.

10 THE COURT: Okay. Thank you.

11 PROBATION OFFICER GRIFFIN: Thank you.

12 **SENTENCE (continued)**

13 THE COURT: So continuing, he had no history of
14 mental health treatment or substance abuse. It was right there
15 that I had placed a note saying that I wanted to hear from
16 Ms. Griffin, who corroborates what I had read earlier in her
17 report and what Mr. Faison has indicated, which is that he was
18 doing well on probation, hadn't been giving anyone any problems
19 until this offense.

20 I note that I received a number of letters on his behalf
21 that speak glowingly of him. I particularly highlight the fact
22 that he is described as being protective of his family, which
23 is certainly consistent, perhaps fortunately or unfortunately,
24 with his actions in this case.

25 He didn't complete high school, but he does have his GED.

1 He took some college courses. He has been self-employed buying
2 and selling cars.

3 He does have a prior record that involves both firearms
4 and drug distribution.

5 I do note, because I think it's worth noting, because
6 Mr. Faison represented himself, we all got to know him better
7 than we typically do get to know a defendant in trial, and I'll
8 note -- and, obviously, just like the lawyers, he's on his sort
9 of best behavior when he's in trial in front of a jury and a
10 judge, but I will note that I was impressed with Mr. Faison
11 from beginning to end, from, you know, behavior during jury
12 instructions, his presentations to the Court, his presentations
13 to the jury. I found him to be intelligent, charming at times,
14 and he certainly -- I still would advise or have advised him to
15 allow Mr. Miller to represent him, but, you know, all things
16 considered, he handled his role well.

17 I note in that regard, because this is unusual, as I
18 indicated before, at the end of every trial, I go back and
19 speak to the jury. I usually don't bring any comments that I
20 hear from them into a sentencing. Here I will because the
21 juror brought those comments into the sentencing by submitting
22 a letter. You know, it was clear from my conversations with
23 them, and it's clear from the e-mail that I received, that the
24 juror -- the jurors struggled with this, and I think, in part,
25 because they, for lack of a better word, found him likable,

1 found him sympathetic given the situation that he was placed
2 in, and I just -- I find that remarkable considering, again,
3 they got more opportunity than usual to get to know him.

4 I also note the presence of, I think, a different juror
5 than the one who sent the note in the courtroom. And so I find
6 that worth noting.

7 Regarding this offense, however, the defendant was in a
8 road-rage incident, which we all agree was unfortunate. But
9 what happened next was that, along with his father, they drove
10 back to the house as the car followed him, and he retrieved a
11 firearm. He was then pulled over by the police, and the
12 firearm -- and I should say plural, firearms were recovered.
13 One was loaded; one was not.

14 At trial there was some indication that he went into a
15 shed, or some similar apparatus, looking for something and
16 happened to stumble upon the firearms. I simply don't believe
17 that to be true. I believe he knew where the firearms were, he
18 recovered them, and, you know, had them in his possession with
19 at least the possibility of doing harm to these individuals he
20 had been in the road-rage incident with.

21 A search warrant of the house revealed a number of items.
22 I won't list them all. They've all been made a part of the
23 record here. It includes ammunition, for which the jury
24 acquitted him; PCP found in his room; a larger amount of drugs
25 found in his brother's room; some silencer parts, which does

1 concern the Court because silencers, for the most part, are
2 used to -- I don't know if making firearms more lethal would be
3 the way to say it but, certainly, often used as part of
4 additional criminal conduct. So his what seems like interest
5 in and creation of silencer parts is something that concerned
6 the Court.

7 Also, the jail calls the Court listened to give the Court
8 grave concerns for his intentions towards the individuals who
9 he had been in the road-rage incident with.

10 Regarding the seriousness of the offense, I think anytime
11 somebody with his record is in possession of firearms, it's a
12 serious offense. We'll never know. Only Mr. Faison knows for
13 sure what he was intending to do with those firearms. But,
14 again, I do believe he left the house with an intent to do them
15 harm, which makes this a very serious offense. Even accepting
16 what he says, that maybe he was going to scare them away or
17 maybe it was purely for protection, those really aren't
18 justifications.

19 I don't want to sound naive or unrealistic, but if we are
20 placed in harm's way, that is why we rely on the police. We
21 don't arm ourselves and go out looking for people. This is not
22 the wild west. And so, under any circumstances, I don't
23 believe his actions here were remotely justified. And so I do
24 find that it's a serious offense.

25 There is a need for deterrence. He certainly needs to

1 know, if he does not know already, that similar behavior in the
2 future is not tolerated.

3 Although, looking at his history, there is not a
4 significant amount of violence. There are other charges. So
5 in determining the need to protect the public, I do see some
6 need to protect the public, because, certainly, as I've said
7 over and over again, and so I'll try not to be overly
8 repetitive here, but given what I believe he had in mind, I do
9 see some need to protect the public. Although his history does
10 not indicate a lengthy history of violence, so I am also
11 considering that.

12 Regarding the advice of the sentencing guidelines, as I
13 indicated, he is properly calculated as an offense level 26,
14 with a guideline range of 92 to 115 months.

15 I am going to vary downward from that guideline range and
16 sentence him as if he was offense level 24 because of -- again,
17 I find the stolen firearm enhancement does not in any way bear
18 on his culpability, and I see the purposes of enhancements to
19 be reflective of the defendant's culpability, and I just --
20 that enhancement, in my view, does not go to that in any way.
21 And so I am going to vary downward from that enhancement, which
22 means that he is an offense level -- for purposes of me
23 sentencing him -- an offense level of 24 with a category 4,
24 which means his guideline range is 77 to 96 months.

25 After determining all these factors, after reviewing all

1 these factors, I do find that as to GJH-19-27 -- did I get the
2 year right? Yes, 19-27. The sentence that is sufficient, but
3 not greater than necessary, to comply with the purposes set out
4 at 18 U.S.C. 3553(a)(2), is a sentence of 77 months, supervised
5 release period of three years.

6 As to special conditions, I noted there weren't any
7 recommended conditions. I don't know if that's just because
8 we're assuming that the conditions he's already under will be
9 applied again or if there's just no recommendation of
10 conditions of supervision.

11 PROBATION OFFICER DASOVIC: Your Honor, there were no
12 special conditions. Because the defendant doesn't have any
13 mental health history or substance abuse history or anything
14 else like that, we didn't fine that any other conditions were
15 necessary.

16 THE COURT: That's fine.

17 I will order that he pay \$100.

18 If I didn't already say this, three years supervised
19 release.

20 The general conditions, obviously, do apply. There are
21 no special conditions.

22 Special assessment of \$100.

23 As to GJH-18-607, I am going to revoke his supervised
24 release. I do believe he's properly classified as a grade A
25 with a criminal history category of 4. That would be a

1 guideline range of 37 to 46 months. However, given that the
2 conduct for which he's being revoked is the conduct for which I
3 just provided an additional relatively lengthy sentence, I was
4 intending already, even before hearing his argument, to
5 sentence him within the range that would be a grade B. So I am
6 not going to further go into that argument other than to say I
7 find that grade A is appropriate. But even if I were to have
8 found him as a grade B, the sentence would end up being the
9 same.

10 So I am going to revoke his supervised release as to
11 those counts. I will sentence him on those counts to a term of
12 imprisonment of 14 months. That 14 months does run consecutive
13 to the 77 months that he's been sentenced to in the new case,
14 for a total of 91 months.

15 As to the prior case, he was previously on supervised
16 release in that case for a period of eight years. I'm going to
17 simply put him back on supervised release as to that case for
18 three years, to run concurrent with the three years that he'll
19 be on supervised release in the new case, with the same
20 conditions of release that may already exist in that case.

21 Is there a recommendation for where I place him within
22 the Bureau of Prisons?

23 I'm sorry, I'm used to directing that question toward
24 counsel. Is there a recommendation that you would like me to
25 make as to where the Bureau of Prisons places you?

1 THE DEFENDANT: Yes, sir, Fort Dix. Before I left, I
2 believe they were trying to implement being able to access
3 college through the computers they have in the library, and
4 because of my present correspondence with Ashland University in
5 Ohio, it doesn't start again until February. But I've already
6 wrote the director to find out if I can get the tablet, if I
7 can't get to somewhere that has it. But as far as the
8 recommendation, I would ask to go back to Fort Dix.

9 THE COURT: The Court recommends that provided the
10 Bureau of Prisons otherwise determines the appropriateness of
11 the security level, the place of incarceration be Fort Dix.

12 The sentence that I have imposed on the 19-27 case is
13 within the guideline range as I established it. Obviously, the
14 government had a number of objections that are preserved for
15 the record if they choose to pursue that. But, ultimately, the
16 sentence that I imposed is within the guideline range as I
17 established it, and I think that it's appropriate in light of
18 my findings under 3553(a) factors and purposes.

19 Are there any counts that the government needs to move to
20 dismiss? We went to trial on two counts. He was acquitted on
21 one, so I don't think there is.

22 MS. WRIGHT: No, there are not, Your Honor, not that
23 I know of.

24 THE COURT: I think this was a superseding
25 indictment; is that right?

1 MS. WRIGHT: Yes, it was, Your Honor.

2 THE COURT: So the original indictment will be
3 dismissed.

4 MS. WRIGHT: Yes, thank you, Your Honor.

5 THE COURT: I will note for the record that I did
6 attach the juror letter as a court exhibit. However, it will
7 be a redacted version. So make sure that the version that goes
8 in does not have the juror's name or address, which were both
9 in the original.

10 Sir, because you went to trial, you can appeal your
11 conviction, you can appeal any pretrial rulings I have made, as
12 well as your ultimate sentence if you believe that the sentence
13 I just gave you was unlawful. You need to file your notice of
14 appeal within 14 days of the judgment and commitment order.

15 Now, I will say -- and I might talk to a colleague about
16 the best way to structure this. I am going to write something
17 to address the various legal issues. I'm not sure if I need to
18 do that before or at the same time I issue the judgment and
19 commitment order, but I will check that. But in any event, you
20 have 14 days, from the date that I issue the judgment and
21 commitment order, to file your notice of appeal. So we will do
22 that, as well as a statement of reasons.

23 Is there anything else that I'm forgetting to address?

24 THE DEFENDANT: There is one point I'd like to bring
25 up. It's in reference to the discovery. At this point I'm

1 still left without being in possession of the discovery. So
2 once I go and I'm transferred to BOP, I don't know what the
3 Court is going to determine as far as my discovery issue.

4 THE COURT: You mean the ability to have the
5 discovery with you to work on your appeal after you've been
6 transferred to BOP?

7 THE DEFENDANT: Yes.

8 THE COURT: I leave that to BOP to determine what you
9 are allowed to bring with you.

10 THE DEFENDANT: Well, the problem is, as it stands,
11 you made the determination that I will go through Mr. Miller to
12 still look at the discovery. Once I'm gone -- so I'm asking
13 that everything be given to me before I leave. That way I can
14 take the discovery with me.

15 THE COURT: I'll hear if any counsel has a view on
16 that.

17 MS. WRIGHT: Your Honor, we do oppose that. The
18 concerns about Mr. Faison having the direct access to discovery
19 while incarcerated apply equally in terms of BOP custody. I
20 don't know if there would be a situation where standby counsel
21 could be appointed in connection with the appeal or there could
22 be specific documents he's interested in, but we certainly do
23 object to any change of the status quo at this point in
24 connection with how the discover would be handled and it going
25 somehow wholesale into BOP at all.

1 THE COURT: Yeah, I tend to agree with that. I'll
2 give some thought to whether or not -- this wouldn't be within
3 my jurisdiction at this point. I guess what I'll say is it
4 would be up to the Fourth Circuit. If you're appointed standby
5 counsel for the purposes of your appeal, that needs to have
6 access somehow to your discovery materials, I don't know if
7 current standby counsel has any practical thoughts on that, but
8 my view on your access to discovery has not changed. I do
9 understand your position on that.

10 THE DEFENDANT: I just have one question. For the
11 record, I would like it to be clear from the government as to
12 why they feel that I shouldn't have access to the discovery --

13 THE COURT: I believe it's the same safety issues
14 that are at play with you having discovery during pretrial.

15 THE DEFENDANT: Right, and that was actually just the
16 information about the witness -- that information can be
17 removed because I already have it. The police reports with his
18 name, any other reports that have his name on it that I don't
19 need. Some of the reports are redacted. But, like, the police
20 reports, his signed statement, I don't need any of those; I
21 have them.

22 My thing is I want to be able to go through the entire
23 discovery to make sure there isn't anything that I missed
24 because I wasn't in possession of it. So I'm asking, like,
25 what is it specifically that is preventing them from giving me

1 that access if all the main issue is just having the guy's name
2 floating through the prison?

3 THE COURT: I think at this point that's an issue for
4 you to take up with the Fourth Circuit.

5 THE DEFENDANT: Okay.

6 THE COURT: I don't know if you want to put something
7 on the record on that point, since you're standing.

8 MS. WRIGHT: No, Your Honor. I could if the Court so
9 desired, but, otherwise, I had a separate issue to raise before
10 we broke.

11 THE COURT: Go right ahead.

12 MS. WRIGHT: Your Honor, my only question was with
13 respect to the term of supervised release imposed for
14 GJH-18-607. My understanding -- and I guess I have to lodge an
15 objection, and that was that because the original term of
16 imprisonment was eight years, and under the relevant statute
17 there, the term of supervised release had to be at least eight
18 years. My understanding is that the appropriate term of
19 supervised release there -- and we certainly think the longer
20 term is appropriate anyway, but I think it would have to be
21 eight years, less the term of imprisonment imposed, rather than
22 being able to be reduced to three years.

23 I don't know if Probation has a view on that as well, but
24 we would lodge that as an objection because I think the term of
25 supervised release on 18-607 particularly has to be longer.

1 THE COURT: I do think you're right about that. Does
2 probation agree with that.

3 PROBATION OFFICER GRIFFIN: Yes, sir, I do.

4 THE COURT: I do think that's correct. I hadn't
5 heard a recommendation, which is why I went with that. But
6 having had that pointed out, I think that's right.

7 So it would be eight years, minus the 14 months. And so
8 that would be six years and -- I'm bad at math at this time of
9 day -- 10 months. Six years and 10 months?

10 MS. WRIGHT: I'm also bad at math, Your Honor, but I
11 believe it would be six years and eight months. Am I correct
12 on that?

13 THE COURT: I sentenced him to 14 months.

14 MS. WRIGHT: Yes, six years and 10 months. Yes,
15 you're correct, Your Honor.

16 THE COURT: Okay. So six years and 10 months will be
17 the term of supervision on 18-607; that is correct.

18 Oh, was there a request for an order of forfeiture?

19 MS. WRIGHT: There was not, Your Honor. The items in
20 question have been administratively forfeited. Thank you, Your
21 Honor.

22 THE COURT: Anything else that we need to address?

23 THE DEFENDANT: Yes, Your Honor. I believe that the
24 way that the statute is reading for supervised release
25 following revocation, it doesn't require the term the way that

1 the government is asking. It says that the defendant --
2 "requirement that the defendant be placed on a term of
3 supervised release after imprisonment, then, therefore, such
4 term of supervised release shall not exceed the term of
5 supervised release authorized by statute for the offense that
6 resulted in the original term of supervised release, less any
7 term of imprisonment that was imposed upon revocation of
8 supervised release."

9 THE COURT: Yeah, is there a minimum term as opposed
10 to a maximum?

11 MS. WRIGHT: Yes, there is a minimum term.

12 THE COURT: What's the statute? What are we
13 referring to? Or I can ask this side. What are you reading
14 from?

15 MS. WRIGHT: Yes, 841.

16 THE DEFENDANT: I think it's 3583.

17 THE COURT: I'm sorry, 18 or 21?

18 THE DEFENDANT: 18 U.S.C. 3583.

19 THE COURT: One at a time. 18 U.S.C.

20 THE DEFENDANT: 3583(h).

21 MS. WRIGHT: Your Honor, the government's position is
22 that that is the default term, in that 21 U.S.C. Section 841
23 supersedes that and the relevant provision there --

24 THE COURT: It says "shall not exceed." It doesn't
25 say it has to be that. It says it shall not exceed.

1 MS. WRIGHT: Your Honor, and then in 21 U.S.C.
2 Section 841(b)(1)(B) --

3 THE COURT: I'm sorry, what was the cite?

4 MS. WRIGHT: 21 U.S.C. Section 841(b)(1)(B), the
5 last -- I guess towards the end. It says "notwithstanding
6 Section 3583 of Title 18, any sentence imposed under this
7 subparagraph shall," and then there's a part that's not
8 relevant, "include a term of supervised" --

9 THE COURT: 841(b) --

10 MS. WRIGHT: (1)(B). And he had a prior qualifying
11 conviction, if I'm reading the document correctly. So the term
12 of supervised release would be at least eight years in addition
13 to the term of imprisonment.

14 THE COURT: Mr. Faison, given the hour, I'll briefly
15 let you respond if you want to respond to that point.

16 THE DEFENDANT: Right. I believe she's reading it as
17 if I'm receiving this charge. 35(a)(3)(H) governs receiving
18 supervised release after revocation, and I think that's the
19 statute that the Court would be actually required to go by and
20 not the reading of 841. 841 is applied as if you were
21 receiving that particular conviction.

22 THE COURT: I understand both arguments. I do think,
23 having looked at it, the government is right. So it will be
24 six years and 10 months.

25 Anything else we need to address today?

1 THE DEFENDANT: That's it.

2 THE COURT: Anything else?

3 MS. WRIGHT: Not for the government. Thank you, Your
4 Honor.

5 THE COURT: Mr. Faison, I do wish you well. I do
6 wish you well in the future.

7 THE DEFENDANT: Thank you.

8 (The hearing concluded at 5:40 p.m.)
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1 CERTIFICATE OF OFFICIAL REPORTER

2
3 I, Cindy S. Davis, Federal Official Court Reporter in and
4 for the United States District Court for the Southern District
5 of Maryland, do hereby certify that I reported, by machine
6 shorthand and computer-aided transcription, in my official
7 capacity the proceedings had in the case of United States of
8 America versus Burudi Jarade Faison, case numbers
9 8:19-cr-00027-GJH and 8:18-cr-00607-GJH, in said court on
10 January 10, 2020.

11 I further certify that the foregoing 192 pages constitute
12 the official transcript of said proceedings as taken from my
13 electronic notes to the best of my ability.

14 In witness whereof, I have hereto subscribed my name this
15 10th day of February 2020.

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